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Mark Vincent Nuccio

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NOTES

PREScribing PREVENTIVE REMEDIES FOR AN AILING PUBLIC CONSTRUCTION INDUSTRY: REFORMS UNDER THE NEW MASSACHUSETTS COMPETITIVE BIDDING STATUTE

Competitive bidding statutes are designed to ensure that responsible contractors perform work at the lowest possible cost.¹ While it is usually not difficult to determine the lowest bidder on any project, selecting a responsible or qualified contractor is a more complicated task.² Jurisdictions vary in approaches to choosing responsible contractors for public projects.³ The federal government, for example, has enacted debarment procedures designed to prevent awards to contractors likely to have performance problems.⁴ Certain

¹ See ALA. CODE §41:16-27 (Michie 1977), CAL. GOV'T CODE §14250 (West 1966), DEL. CODE ANN. tit. 28, §6907. See also *American Totalisator Co. v. Seligman*, 27 Pa. Comm. 639, 643, 367 A.2d 756, 758 (1976) (the law in the field is that even in the absence of a constitutional or statutory requirement that a contract be awarded to the lowest responsible bidder, if in fact the public authority invites bids, public policy and the economical conduct of governmental business require that the contract be awarded to the lowest responsible bidder); *O'Brien v. Carney*, 6 F. Supp. 761, 762 (E.D. Mass. 1934) (selection of the lowest "responsible bidder" by federal officers requires that not only the pecuniary ability but also the judgment, skill, capacity, and integrity of the bidder be considered); *People v. Omen*, 290 Ill. 59, 70-71, 124 N.E. 860, 865 (1919) (the phrase "lowest responsible bidder" as used in the local Improvement Act, does not mean the lowest bidder financially only, but the bidder who by experience and otherwise is most capable of doing the work in a satisfactory manner); *Arglo Printing Corp. v. Board of Educ.*, 47 Misc. 2d 618, 620-21; 263 N.Y.S.2d 124, 128 (1965) (corporation's submission of lowest bid on certain school work did not establish it as the "lowest responsible bidder" within Education Law provision requiring Board of Education to let all contracts for public works to the lowest responsible bidder). A long line of cases has established that public contracts subject to various Massachusetts competitive bidding statutes cannot properly be awarded other than to the lowest eligible bidder. *Interstate Engr. Corp. v. City of Fitchburg*, 367 Mass. 751, 757, 329 N.E.2d 128, 131 (1975); *Gosselin's Dairy, Inc. v. School Comm.*, 348 Mass. 793, 793, 205 N.E.2d 221, 221 (1965); *Rudolph v. City Manager*, 341 Mass. 31, 38, 167 N.E.2d 151, 156 (1960); *East Side Constr. Co., Inc. v. Adams*, 329 Mass. 347, 354, 108 N.E.2d 659, 663 (1952); *Gifford v. Commissioner of Public Health*, 328 Mass. 608, 610, 105 N.E.2d 476, 478 (1952).

² See *Menke v. Board of Education, Ind. Sch. Dist.*, 211 N.W.2d 601, 607 (1973) (Within the context of statutes directing that contracts be let to the lowest responsible bidder, it has been held repeatedly that the lowest pecuniary bid is but a single consideration in the determination as to who is the lowest responsible bidder. Responsibility may embrace factors other than the low dollar figure, including such considerations as the business judgment of the bidder and the bidder's record for reliability in performance. Only the exercise of sound discretion by a public body will satisfy the statute.)

³ The federal government allows the awarding authority to make the decision regarding a bidder's responsibility. See, e.g., 41 C.F.R. §1-1.1205 (1981). Some states have formal pre-qualification systems and then allow contractors to bid only on contracts within their range of competence. See, e.g., N.J. STAT. ANN. §27:7-35.1-35.12 (West Supp. 1981); CAL. GOV'T CODE §1431 (West 1980).

⁴ P. LATHAM, *GOVERNMENT CONTRACT DISPUTES* 77 (1980). See, e.g., 41 C.F.R. 1-1.600-607 (1981); 32 C.F.R. 1-600-610 (1981).

states have enacted other preventive remedies, such as prequalification to prevent contractors from bidding on projects for which they are unqualified.⁵

Massachusetts has recently repealed its bidding statute covering public construction projects and replaced it with one that prescribes new methods designed to improve the accountability of all parties involved in public construction.⁶ One feature of the new statute is its debarment mechanism which precludes certain undesirable contractors from receiving public construction awards.⁷ Another feature of the statute is prequalification, a mandatory evaluation of prospective bidders' qualifications, which, if concluded adversely, eliminates contractors from consideration before they enter their bids.⁸ The new competitive bidding statute was adopted as part of an omnibus reform of public construction law.⁹ The reform legislation was based on the investigation and recommendations of the Special Commission Concerning State and County Buildings (Special Commission).¹⁰

⁵ See, e.g., N.J. STAT. ANN. §27:7-35.1-35.12 (West Supp. 1981); CAL. GOV'T CODE §1431 (West 1980).

⁶ Act of July 17, 1980, ch. 579, 1980 MASS. ACTS 984 (repealing the former competitive bidding statute, codified at MASS. GEN. LAWS ANN. ch. 149, §§44A-44L, and replacing it with the new competitive bidding statute, codified at MASS. GEN. LAWS ANN. ch. 149, §§44A-44H (West Supp. 1980). There has been a succession of competitive bidding statutes in Massachusetts since 1939. The Act of August 12, 1939, ch. 480, 1939 MASS. ACTS 654 added to the General Laws the original Chapter 149, sections 44A-44D. The Act of June 10, 1954, ch. 645, 1954 MASS. ACTS 641, sections 1-4 added section 44E and amended certain previously existing sections. These sections were further amended by the Act of May 1, 1956, ch. 309, 1950 MASS. ACTS 183 and the Act of June 28, 1956, ch. 493, 1956 MASS. ACTS 364, which were subsequently stricken out by the Act of August 10, 1956, ch. 679, 1956 MASS. ACTS 628 which added in their place new sections 44A-44L, of the Massachusetts General Laws Annotated, relating to the same subject matter. There have been many subsequent amendments to MASS. GEN. LAWS ANN. ch. 149, §§44A-44L in the years up until 1980 when they were repealed in their entirety and replaced by the Act of July 17, 1980, ch. 579, 1980 MASS. ACTS 987.

⁷ MASS. GEN. LAWS ANN. ch. 149, §44C (West Supp. 1980).

⁸ *Id.* at ch. 149, §44D.

⁹ Act of July 17, 1980, ch. 579, 1980 MASS. ACTS 984 (Public Construction Reform Act of 1980). This act addresses many areas of public construction law including, but not limited to, administration of real property, *id.* at 918-26, land use and acquisition, *id.* at 927-35, construction site management, *id.* at 935-44, designer selection, *id.* at 971-82, and contractor selection, *id.* at 984-1002.

Two additional laws were passed during the same legislative session which lend support to this new system of public construction. The first law, Act of July 5, 1980, ch. 388, 1980 MASS. ACTS 485, establishes an Office of Inspector General to investigate fraud, waste, and other abuses in the expenditure of public funds on supplies or construction. *Id.* The second law, Act of July 15, 1980, ch. 531, 1980 MASS. ACTS 726, makes false statements and fraud perpetrated in connection with public construction contracting criminal offenses. *Id.*

¹⁰ The Special Commission was created by Resolve of April 12, 1978, ch. 5, 1978 MASS. RESOLVES 1027 as amended by Resolve of July 23, 1979, ch. 11, 1979 MASS. RESOLVES 926 and Act of June 10, 1980, ch. 257, 1980 MASS. ACTS 209. The Special Commission received a legislative mandate to investigate, as a basis for legislative reform, the existence of corrupt practices and maladministration in the award of contracts related to the construction of state and county buildings since 1968. See Resolve of April 17, 1978, ch. 5, 1978 MASS. RESOLVES 1027.

After a year of investigation, the Special Commission concluded that the management of public construction was inefficient, susceptible to influence, and could not guarantee the quality of the work performed. SPECIAL COMMISSION CONCERNING STATE AND COUNTY BUILDING,

This note analyzes the recently enacted Massachusetts competitive bidding statute. First, the note will describe the former competitive bidding statute's provisions dealing with contractor qualifications as well as the Special Commission's findings regarding the former statute's efficacy. Next, the new competitive bidding statute's preventive remedies will be described. Specifically, the statute's debarment mechanism, pre-bid evaluation process, and procedure for selecting subcontractors will be explained in detail. These preventive remedies of the new statute are, then, evaluated in a two part analysis. The first part analyzes the likely effect of the new statute's debarment provisions in preventing undesirable contractors from participating in competitive public bidding. It will be submitted that debarment will not be imposed frequently because its invocation requires high procedural standards. Thus, the debarment mechanism may not uphold the integrity of the bidding process. The second part analyzes whether the new provisions designed to prevent unqualified contractors from obtaining particular contracts will succeed. The second part reviews the various statutory provisions applicable to general contractors and subcontractors. It will be submitted that the new provisions which apply to general contractors are unworkable and may produce worse results than the former provisions. It will be recommended that awarding authorities minimize the evaluation of prospective bidders and exercise their right to reject unqualified bidders prior to the award. With regard to the provisions applicable to subcontractors, the new provisions are virtually identical to the provisions operative under the former statute. Because of this similarity, it is submitted that unqualified subcontractors will continue to undermine the quality of public buildings constructed in the future. Thus, several legislative and administrative modifications of the subcontractor provisions will be recommended to give subcontractor qualifications appropriate consideration.

I. PREVENTIVE REMEDIES BEFORE THE NEW COMPETITIVE BIDDING STATUTE

Under Massachusetts's former competitive bidding statute, there were no formal procedures for preventing awards of public construction contracts to general contractors likely to have performance problems. Despite the lack of formal procedures to evaluate qualifications, courts noted that a purpose of the statute was to have work done by competent general contractors and subcontractors.¹¹ Under the former statute, general contracts were awarded to the

SUMMARY OF LEGISLATIVE RECOMMENDATIONS OF THE SPECIAL COMMISSION CONCERNING STATE AND COUNTY BUILDINGS 3 (December 5, 1979) (hereinafter cited as SUMMARY OF LEGISLATIVE RECOMMENDATIONS). For the entire findings, recommendations, and history of the Special Commission see, SPECIAL COMMISSION CONCERNING STATE AND COUNTY BUILDINGS 1-10 FINAL REPORT OF THE SPECIAL COMMISSION CONCERNING STATE AND COUNTY BUILDINGS, (December 31, 1980) (hereinafter cited as FINAL REPORT). This multivolumed document provides much of the evidence and rationale for the three acts passed in 1980 relating to public discussion.

¹¹ *Rudolph v. City Manager of Cambridge*, 341 Mass. 31, 38, 167 N.E.2d 151, 156 (1960). *Fred C. McClean Heating Supplies, Inc. v. Westfield Trade High School Bldg. Comm.*, 345 Mass. 267, 273, 186 N.E.2d 911, 916 (1962).

"lowest responsible and eligible bidder."¹² More specifically, the statute required that among those bidders possessing the skill, ability, and integrity necessary to perform the work, the lowest bidder obtain the contract.¹³ Each public awarding authority could demand that a bidder submit essential information regarding his qualifications to perform a particular contract.¹⁴ There was, however, no requirement that an awarding authority solicit or consider such information.¹⁵ Nevertheless, the statute did permit awarding authorities to reject any bids if doing so was in the public interest.¹⁶ Whether a bidder was incompetent to perform the project was a question for the awarding authority to decide; the issue could not be determined by the courts.¹⁷

The former competitive bidding statute also had no formal procedures for preventing awards to subcontractors likely to have performance problems. Under the statute, subcontracts were awarded through a filed subbid system.¹⁸ This system mandated that specifications for all proposed construction projects be divided into seventeen or more separate subsections.¹⁹ Awarding authorities then solicited subbids for each of the project's subsections.²⁰ The awarding authorities, however, reserved the right to reject any subbid if it determined that the subbidder was not competent to perform the work as specified.²¹

Under Massachusetts's filed subbid system, an interested subbidder filed his bid directly with the awarding authority²² and was required to make certain assurances that, if selected, he would perform adequately.²³ Furthermore, the statute prescribed a bid form which required a subbidder to submit certain information regarding his qualifications.²⁴ Once a subbidder filed a bid, he could not vary it²⁵ and, unless the subbidder affirmatively exercised an option to pro-

¹² MASS. GEN. LAWS ANN. ch. 149, §44A (West Supp. 1980) (repealed 1980). In pertinent part the statute stated, "[E]very contract for the construction, reconstruction, alteration, remodeling, repair or demolition of any building by the commonwealth or by any governmental unit thereof shall be awarded to the lowest responsible and eligible bidder on the basis of competitive bids." As used in the former statute, "governmental unit thereof" included every county, city, town, district, board, commission and other public body. *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* The operative language was "[e]ssential information in regard to such qualifications shall be submitted in such form as the awarding authority may require." *Id.* (emphasis supplied).

¹⁶ *Id.* at ch. 149, §44D. *See* Builders Realty Corp. of Mass. v. City of Newton, 348 Mass. 64, 66, 201 N.E.2d 825, 826 (1964) (city could reject bidder who had not complied in every respect of bidding procedure).

¹⁷ Fred C. McClean Heating Supplies, Inc. v. Westfield Trade High School Bldg. Comm., 345 Mass. 267, 273-74, 186 N.E.2d 911, 916 (1962).

¹⁸ MASS. GEN. LAWS ANN. ch. 149, §44C (West 1971) (repealed 1980).

¹⁹ *Id.*

²⁰ *Id.* at §44D.

²¹ *Id.*

²² *Id.*

²³ *Id.* at §44G.

²⁴ *Id.*

²⁵ *Id.* *See* Interstate Engr. Corp. v. City of Fitchburg, 367 Mass. 751, 758-60, 329 N.E.2d 128, 132-33 (1975).

hibit certain general contractors from using his bid,²⁶ the subbidder was bound to every general contractor using his subbid.²⁷

Under the statute, awarding authorities had little time to review subbids. The statute required that subbids be opened publicly only four days before the date fixed for the opening of general bids.²⁸ Within two days of their opening, subbids were to be reviewed by awarding authorities and rejected if defective.²⁹ Failure to reject a subbid at this time did not prevent an awarding authority from subsequently rejecting the offer.³⁰ Then, no less than two days before the opening of general bids was scheduled, the awarding authority mailed to each prospective general bidder a list of filed subbidders.³¹ General bidders could only choose subbidders listed by the awarding authority.³² Within that list, the general bidder was free to choose any subbidder he preferred, regardless of price.³³

The interposition of the awarding authority between the general contractor and the subcontractors was designed to put all general contractors on equal terms with respect to bids from subcontractors.³⁴ Specifically, the filed subbid system was designed to prevent bid shopping and bid peddling.³⁵ Bid shopping occurs when a general contractor uses the low bid of one subcontractor as a wedge in bargaining for lower subbids from other subcontractors.³⁶ Bid peddling is an attempt by one subcontractor to undercut known bid prices of other subcontractors in order to obtain a contract.³⁷ These practices have long been considered unethical by construction trade associations³⁸ and detrimental to the subbid market as well as to the quality of the finished product.³⁹ By forcing

²⁶ *Id.*

²⁷ *Id.* at §44H.

²⁸ MASS. GEN. LAWS ANN. ch. 149, §44H (West 1971) (repealed 1980).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ The statute provided only that a "person shall not be named by a general bidder as a sub-bidder for a sub-trade [on] the general bid form unless such person is included for such sub-trade in said list." *Id.* See *Interstate Engr. Corp. v. City of Fitchburg*, 367 Mass. 751, 763, 324 N.E.2d 128, 134 (1975) (Wilkins, J., dissenting) (a general contractor is free to select a subbidder who is not the lowest, at the risk of elevating its own bid and losing the general contract).

³⁴ *Gifford v. Commissioner of Public Health*, 328 Mass. 608, 615, 105 N.E.2d 476, 481 (1952).

³⁵ 8 FINAL REPORT, *supra* note 9, at 297. "Cutting through all the rhetoric of its proponents, the [filed subbid] system is designed with one purpose in mind: to prevent bid shopping and bid peddling." For the Special Commission's findings with regard to bid shopping and bid peddling under the filed subbid system see 8 FINAL REPORT, *supra* note 9, at 297-306.

³⁶ Comment, *Bid Shopping and Peddling in the Subcontract Construction Industry*, 18 U.C.L.A. L. REV. 389, 394 (1970).

³⁷ *Id.*

³⁸ *Id.* at 394 n.24 (citing *American Institute of Architects, Handbook of Architectural Practice*, Bk. III, at 702 (1958); *Code of Ethics of the Associated General Contractors of America* §3 (1964)).

³⁹ See CAL. GOV'T CODE §4101 (West 1980).

The legislature finds that the practices of bid shopping and bid peddling in connection with the construction, alteration, and repair of public improvements often

general bidders and subbidders to deal only through the awarding authority, the filed subbid system attempted to reduce the potential for bid shopping and bid peddling.

While the former competitive bidding statute allowed awarding authorities to refuse awards to general contractors and subcontractors likely to have performance problems,⁴⁰ the statute did not provide express guidelines for the awarding authorities to follow when making such determinations. Further, the statute did not require awarding authorities to examine the qualifications of bidders. Apart from the former competitive bidding statute, however, Massachusetts law did provide two methods for preventing general contractors and subcontractors from obtaining public construction contracts which remain in effect today.

First, a finding that a contractor was violating an administratively determined wage rate was grounds for disqualification under Massachusetts law.⁴¹ Violation of that law meant a contractor was prohibited from contracting with public agencies, directly or indirectly, for the construction of any public building or other public works project.⁴² Presumably, this disqualification, or debarment, applied equally to general contractors and subcontractors.⁴³ The first conviction for violating the wage rate resulted in a six-month debarment,⁴⁴ while the second conviction resulted in debarment for a period of three years.⁴⁵

Second, in addition to a violation of the existing wage rate, a violation of Executive Order 147 provided grounds for disqualification.⁴⁶ That executive order provided for the temporary suspension or more prolonged debarment of contractors guilty of crimes relating to obtaining or performing public contracts, or reflecting adversely on a contractor's business integrity.⁴⁷ The order applied with equal force to general contractors and subcontractors, as well as providers of goods and services related to construction.⁴⁸ Violation of the prevailing wage rate and the executive order were the two express means by which a contractor was disqualified from obtaining public construction contracts.

Under the former competitive bidding statute, then, awarding authorities were empowered to refuse awards to contractors likely to have performance

result in poor quality of material and workmanship to the detriment of the public, deprive the public of the full benefits of fair competition among prime contractors and subcontractors, and lead to insolvencies, loss of wages to employees, and other evils.

Id. See also Comment, *supra* note 36, at 396, 396 n.30 (1970).

⁴⁰ See *supra* notes 11-39 and accompanying text.

⁴¹ MASS. GEN. LAWS ANN. ch. 149, §27C (West Supp. 1980).

⁴² *Id.*

⁴³ See *id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Executive Order No. 147 issued on October 31, 1979, by Governor Dukakis.

⁴⁷ *Id.*

⁴⁸ *Id.*

problems or where a refusal was deemed in the public interest. No formal procedures, however, existed to ensure that rational evaluations of prospective contractors occurred. Indeed, the authorities were under no obligation even to examine the qualifications of bidders. The only express means of disqualifying undesirable candidates was to establish a violation of the existing wage rate or Executive Order 147.

II. THE SPECIAL COMMISSION'S FINDINGS

The former competitive bidding statute drew harsh criticisms from the Special Commission during the course of its investigation.⁴⁹ The Special Commission concluded that the management of public construction in Massachusetts was inefficient, susceptible to outside influence, and could not guarantee the quality of the work performed.⁵⁰ The Commission blamed the combination of a low-bid system with the lack of an effective qualification evaluation process for these failings.⁵¹ The Special Commission found that, without regard to his qualifications, the general contractor who submitted the lowest bid was awarded the construction contract.⁵² Although awarding authorities were allowed to examine a general bidder's qualifications,⁵³ the Commission found that no serious effort was made to screen out general bidders with inferior qualifications.⁵⁴

According to the Commission, a major reason that no serious effort was made to evaluate candidates was that the awarding authorities feared litigation would ensue if a low bidder was denied a contract.⁵⁵ Such a lawsuit might have charged the awarding authority with engaging in favoritism. The authorities were concerned that they lacked the tools to defend such a suit.⁵⁶ The Commis-

⁴⁹ SUMMARY OF LEGISLATIVE RECOMMENDATIONS, *supra* note 10, at 10-11; 8 FINAL REPORT, *supra* note 10, at 344.

⁵⁰ SUMMARY OF LEGISLATIVE RECOMMENDATIONS, *supra* note 10, at 3.

⁵¹ 8 FINAL REPORT, *supra* note 10, at 343.

⁵² SUMMARY OF LEGISLATIVE RECOMMENDATIONS, *supra* note 10, at 10-11. The Special Commission summarized its findings with regard to general contractor selection as follows:

Under Massachusetts law, the general contractor who submits the lowest bid, with rare exception, is awarded the construction contract. In too many cases the lowest bidder is not well qualified to undertake the work, and shoddy workmanship results. Even a contractor with a long history of problems on prior jobs will be accepted if he is the low bidder. In other cases, firms which have disregarded or violated state law or failed to comply with public regulations may be permitted to benefit from public employment.

Id.

⁵³ MASS. GEN. LAWS ANN. ch. 149, §44A (repealed 1980). See *supra* notes 11-17 and accompanying text.

⁵⁴ 8 FINAL REPORT, *supra* note 10, at 344.

⁵⁵ *Id.*

⁵⁶ *Id.* One awarding authority made some effort to gather information regarding a bidder's qualifications. For twenty-five years, the Bureau of Building Construction (BBC) required that the lowest general bidder complete a statement of qualifications in order to determine responsibility and eligibility. *Id.* at 345. In the memory of one BBC official, whose responsibility it was to oversee the bidding process, the statement was never used to disqualify a bidder. *Id.*

sion observed that the prior performance of contractors was rarely documented, and that the awarding authorities lacked both the manpower to check the references given by bidders and the legal counsel to formulate procedures to follow in a disqualification proceeding.⁵⁷ The combination of these factors made the authorities reluctant to risk a lawsuit by a spurned low bidder, whatever his qualifications.⁵⁸

The Commission noted that the lack of evaluation that flawed the former statute's treatment of general contractors plagued the statute's filed subbid system as well.⁵⁹ The filed subbid system did allow awarding authorities to reject bids from subcontractors deemed incompetent to perform.⁶⁰ The Special Commission found, however, that there was less review of subbidders' qualifications than of general bidders'.⁶¹ One major awarding authority reviewed subbids only for formal defects because of the short time period allotted by the statute to such a review.⁶² While time pressures make the cursory evaluation understandable, the result was, nevertheless, that awarding authorities did not screen subbidders on the basis of their qualifications.⁶³

Just as the awarding authorities failed to screen subbidders adequately, so too did the general contractors, selecting their subcontractors through the filed subbid system, neglect to review the subbidders' qualifications. The Special Commission found that awarding authorities usually selected the lowest available general bidder, without regard to his past performance.⁶⁴ Thus, to remain price-competitive with their peers, general contractors felt compelled to use the lowest available subbidders, secure in the knowledge that they were not liable for the subcontractor's performance.⁶⁵ In choosing subcontractors not among the lowest of those listed by the awarding authorities, general contractors risked any chance of winning the contract.⁶⁶ Every general bidder, according to the Special Commission, had to assume that there would be at least one other general bidder who would use the lowest subbidder, regardless of the quality of that subcontractor's past performance.⁶⁷ Thus, an overemphasis on the subcontractor's competence could price the general contractor out of the

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ 1 FINAL REPORT, *supra* note 10, at 5-3. The Special Commission had an assortment of other criticisms of the filed subbid system. Those criticisms included the system's inability to stop bid shopping and bid peddling, 8 FINAL REPORT, *supra* note 10, at 329-30, its cumbersome administration, 7 FINAL REPORT, *supra* note 10, at 330, its high cost, *id.* at 331, and its denial of access to the process to a large number of subcontractors, 8 FINAL REPORT, *supra* note 10, at 330-31.

⁶⁰ See *supra* notes 18-39 and accompanying text for a description of the filed subbid system.

⁶¹ 1 FINAL REPORT, *supra* note 10, at 5-3.

⁶² 8 FINAL REPORT, *supra* note 10, at 293. See *supra* notes 28-31 and accompanying text for explanation of the shortness of time to review subbids.

⁶³ 1 FINAL REPORT, *supra* note 10, at 5-3.

⁶⁴ SUMMARY OF LEGISLATIVE RECOMMENDATIONS, *supra* note 10, at 10-11.

⁶⁵ 8 FINAL REPORT, *supra* note 10, at 295.

⁶⁶ *Id.* at 294.

⁶⁷ *Id.*

market. The Special Commission believed that the only factor which would force a general contractor to reject the lowest subbidder because of its history of poor performance would be the general contractor's ability to win future awards was damaged by a subcontractor's poor performance.⁶⁸

The Special Commission found the express means by which contractors could be debarred or suspended from contracting with public agencies — establishing a violation of the prevailing wage rate or Executive Order 147 — of little generative force in preventing unqualified contractors from obtaining contracts.⁶⁹ The Special Commission discovered that the wage rate began to be enforced only recently,⁷⁰ and that even if compliance were vigorously enforced, the problems created by other dishonest or incompetent contractors would not be addressed.⁷¹ As for the effect of Executive Order 147, the Commission found no reported case of the Order's enforcement resulting in debarment or suspension.⁷² In fact, the Special Commission reported that the largest awarding authority was ignorant of the Executive Order's existence.⁷³

In summary, preventive remedies under the old competitive bidding statute were limited to discretionary initiatives to review bidders' qualifications which were seldom utilized. The express means outside the old statute to debar or suspend contractors were unenforced. The ineffective use of such preventive remedies allowed incompetent or irresponsible general contractors and subcontractors to be selected for public projects. That such contractors have performed a substantial portion of the public construction projects in Massachusetts is evidenced by the Special Commission's projected cost of repairing public structures. Since 1968, Massachusetts taxpayers have paid \$17 billion for public construction projects,⁷⁴ and the Special Commission estimated that over the next ten years taxpayers will spend an additional \$848 million repairing those same structures.⁷⁵ The Special Commission concluded that a prime cause for this abysmal performance was a competitive bidding system that selected the lowest priced general bidder without regard to the bidder's qualifications.⁷⁶ This conclusion provoked the Special Commission to recommend the erection of significant procedural barriers to prevent unqualified and irresponsible contractors from obtaining public construction contracts.⁷⁷ The Massachusetts legislature responded with a new competitive bidding statute.

⁶⁸ *Id.*

⁶⁹ *Id.* at 346.

⁷⁰ *Id.* at 347.

⁷¹ *Id.* at 346. Debarment for violation of the prevailing wage rate, the Commission noted, does help ensure the quality of workmanship by guaranteeing public construction workers a fair wage. *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ 1 FINAL REPORT, *supra* note 10, at 2-1.

⁷⁵ *Id.* 2-2 to 2-3.

⁷⁶ 8 FINAL REPORT, *supra* note 10, at 343.

⁷⁷ See SUMMARY OF LEGISLATIVE RECOMMENDATIONS, *supra* note 10, at 12.

III. PREVENTIVE REMEDIES IN THE NEW COMPETITIVE BIDDING STATUTE

The new competitive bidding statute⁷⁸ prescribes two new procedures to prevent awards to contractors likely to have performance problems.⁷⁹ The new statute extends the use of debarment to preclude certain contractors from consideration for public projects.⁸⁰ In addition, the statute requires awarding authorities to undertake a pre-bid evaluation of prospective general bidders' qualifications.⁸¹ This section of the note first describes the statute's expansion of debarment procedures and then examines the pre-bid evaluation provisions of the statute. Finally, the treatment of subbidders under the new statute will be considered.

A. Expansion of Debarment Procedures

The new competitive bidding statute includes a broad debarment mechanism. Debarment is possible under other provisions of Massachusetts law.⁸² The new statute's debarment provisions, modeled on the debarment standards found in federal government regulations,⁸³ provides that a contractor may be prohibited from bidding on public construction contracts for engaging in a variety of criminal and non-criminal practices.⁸⁴ Conviction for a criminal offense relating to the performance, acquisition or attempt to acquire a private or public contract or subcontract and conviction for an offense indicating a lack of business integrity are but two types of criminal activity for which a contractor may be debarred.⁸⁵ Additionally, the Deputy Commis-

⁷⁸ MASS. GEN. LAWS ANN. ch. 149, §§44A-44H (West Supp. 1980).

⁷⁹ *Id.* at §44C, 44D.

⁸⁰ *Id.* at §44C. See *supra* notes 41-48 and accompanying text for a description of debarment mechanisms available before the new competitive bidding statute.

⁸¹ MASS. GEN. LAWS ANN. ch. 149, §44D (West Supp. 1980).

⁸² See *supra* notes 41-48 and accompanying text for a description of debarment for violations of the prevailing wage rate and Executive Order 147.

⁸³ 8 FINAL REPORT, *supra* note 10, at 353. See Federal Procurement Regulations, 41 C.F.R. 1-1.600-1.607 (1981).

⁸⁴ MASS. GEN. LAWS ANN. ch. 149, §44C (West Supp. 1980).

⁸⁵ *Id.* at §44C(3)(a). There are many criminal offenses for which debarment may be imposed. The statute provides:

(3) Debarment may be imposed for any of the following causes,

(a) Conviction of final adjudication by a court or administrative agency of competent jurisdiction of any of the following offenses:

(i) a criminal offense incident to obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract; (ii) a criminal offense involving embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property or any other offense indicating a lack of business integrity or business honesty which seriously and directly affects the contractor's present responsibility as a public contractor; (iii) a violation of state or federal antitrust laws arising out of the submission of bids or proposals; (iv) a violation of state or federal laws regulating campaign contributions; (v) a violation of any state or federal laws regulating hours of labor, prevailing wages, minimum wages, overtime pay, equal pay or child labor; (vi) a violation of any state or general law prohibiting discrimination in employment;

sioner of Capital Planning and Operations may debar contractors who engage in certain non-criminal activities upon determination based on clear and convincing evidence.⁸⁶ Depending upon the seriousness of the offense, debarment may last for a period of up to five years.⁸⁷

Debarment may be used as a remedy against a host of construction entities including general contractors, subcontractors, and affiliates of such entities.⁸⁸ During a period of debarment, bids for any public construction project will not be solicited or considered from debarred entities.⁸⁹ Presumably because of the seriousness of the debarment remedy,⁹⁰ the statute grants certain procedural

(vii) repeated or aggravated violation of any state or federal law regulating labor relations or occupational health or safety.

Id.

⁸⁶ *Id.* at §44C(3)(b). The statute provides that debarment may be imposed by:

(b) Clear and convincing evidence as determined by the deputy commissioner of the commission of any of the following acts: (i) willful supplying of materially false information incident to obtaining or attempting to obtain or performing any public contract or subcontract; (ii) willful failure to comply with the record-keeping and accounting requirements set forth in section thirty-nine R of chapter thirty; (iii) a record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more public contracts, provided that such failure to perform or unsatisfactory performance has occurred within a reasonable period of time preceding the determination to debar and provided further that such failure to perform or unsatisfactory performance was not caused by factors beyond the contractor's control; (iv) any other cause affecting the responsibility of a contractor which the deputy commissioner determines to be of such serious and compelling nature as to warrant debarment.

Id.

Of particular note are the record-keeping requirements. Every contractor engaged in a public contract must maintain business records which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the contractor. For contracts in excess of \$100,000, the contractor must file a statement of management disclosing its internal control of assets prior to execution of the contract, reviewed by a certified public accountant and accompanied by the certified public accountant's statement of review. A financial statement is also required for contracts valued over \$100,000 which is based on and is prescribed by statute. MASS. GEN. LAWS ANN. ch. 30, §39 R (West Supp. 1980).

⁸⁷ MASS. GEN. LAWS ANN. ch. 149, §44C(1) (West Supp. 1980).

⁸⁸ *Id.* The statute provides in pertinent part:

"Contractor" means any person or entity that has furnished or seeks to furnish goods or services under contract with a public agency or with an acquisition, planning, design, construction, demolition, installation, repair or maintenance of any capital facility. Contractors subject to this section shall include, but shall not be limited to, general contractors, subcontractors, materials suppliers and vendors, and suppliers of architectural, engineering, construction management, testing, land surveying and consultant services. Employees of a public agency who furnish goods or services in the course of their employment shall not be subject to this section.

"Affiliates" means entities which are affiliates of each other when either directly or indirectly one concern or individual controls or has the power to control another, or when a third party controls or has the power to control both.

Id.

Debarment may also include all known affiliates of a contractor. *Id.* at §44C(6).

⁸⁹ *Id.* at §44C(7).

⁹⁰ See *Gonzalez v. Freeman*, 334 F.2d 570 (D.C. Cir. 1964) where then Circuit Judge Warren Burger stated on the subject of federal debarment:

safeguards to contractors subject to debarment.⁹¹ For example, the statute specifies that no contractor may be debarred without first having received sufficient notice⁹² and an opportunity to be heard.⁹³ In the course of weighing the evidence in a debarment proceeding, the statute admonishes the fact finder to take all facts and circumstances into account.⁹⁴ Debarment may be removed or reduced upon application supported by documenting evidence setting forth appropriate grounds for relief.⁹⁵ Appropriate grounds for relief are newly discovered material evidence, reversal of a judgment or conviction, *bona fide* change of ownership or management, or the elimination of the causes for which the debarment was initially imposed.⁹⁶

Debarment procedures and determinations are entirely centralized in the Division of Capital Planning and Operations.⁹⁷ The Special Commission considered it appropriate to centralize the procedures in order to assure strictly

The impact of debarment on a contractor may be a sudden contraction of bank credit, adverse impact on the market price of shares of listed stock . . . and critical uneasiness of creditors generally, to say nothing of "loss of face" in the business community.

Id.

Although debarment at the state level represents, perhaps, a lesser financial loss than at the national level, the difference is only one of degree. Smaller state or local companies may be affected as deeply by a state debarment as would a national enterprise by a federal debarment.

⁹¹ MASS. GEN. LAWS ANN. ch. 149, §44C(5) (West Supp. 1980). The statute provides in pertinent part:

(5) Except as provided in section twenty-seven C of this chapter, no contractor may be debarred unless the deputy commissioner has first informed the contractor sought to be debarred by written notice of the proposed debarment mailed by registered or certified mail to the contractor's last known address. The notice shall inform the contractor of the reasons for the proposed debarment and shall state that the contractor will be accorded an opportunity for a hearing if s/he so requests within fourteen days of receipt of the notice. A hearing requested under this section shall be conducted by the deputy commissioner or his/her designee within thirty days of receipt of the request, unless the deputy commissioner grants additional time therefor. The hearing shall be conducted according to the rules for the conduct of adjudicatory hearings established by the commissioner of administration pursuant to chapter thirty A. A debarment shall not be imposed until (i) fourteen days after receipt by the contractor of notice of the proposed debarment if no hearing is requested, or (ii) the issuance of a written decision by the deputy commissioner or his/her designee which makes specific findings that there is clear and convincing evidence to support the debarment and that debarment for the period specified in the decision is required to protect the integrity of the public contracting process. A contractor shall be notified forthwith of the decision by registered or certified mail, and of his/her right to judicial review in the event that the decision is adverse to the contractor.

Id.

Section 27C, the exception above, is debarment for violation of the prevailing wage rate.

⁹² MASS. GEN. LAWS ANN. ch. 149, §44C(5) (West Supp. 1980).

⁹³ *Id.*

⁹⁴ *Id.* at §44C(4).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at §44C(2)(g).

uniform application, given that debarment is of such serious consequence to the contractor.⁹⁸ The Commission also determined that centralization would not impose an undue administrative burden on the Division since it was not anticipated that debarment would be imposed frequently.⁹⁹ Under these new statutory procedures, debarment eliminates serious offenders of honest business practices from consideration for public construction projects before the bidding even begins.¹⁰⁰ Assuming a general contractor is not debarred, his qualifications for a *particular* construction project will yet be scrutinized by the awarding authority pursuant to the second major reform of the new competitive bidding statute by a system of prequalification.¹⁰¹

B. *Evaluation of the Qualifications of Prospective General Bidders*

The new competitive bidding statute requires a general contractor to demonstrate that he has the requisite skill, ability, and integrity to perform faithfully the work called for by a particular contract.¹⁰² Each awarding authority bases its evaluation of whether a general contractor has made such a showing upon information regarding competent workmanship and financial soundness¹⁰³ contained in two documents which every prospective general bidder must file: the prequalification statement¹⁰⁴ and the application to bid.¹⁰⁵

Before a bid can be accepted the statute requires a prospective general bidder successfully to complete and file a prequalification statement¹⁰⁶ which discloses detailed information on the applicant's organization and experience,¹⁰⁷ as well as on its financial condition.¹⁰⁸ The statement, however, need not be filed in conjunction with every prospective bid. Rather, it is filed only on an annual basis.¹⁰⁹ In addition to the specific statutory disclosure re-

⁹⁸ 8 FINAL REPORT, *supra* note 10, at 352-53.

⁹⁹ *Id.*

¹⁰⁰ MASS. GEN. LAWS ANN. ch. 149, §44C(7) (West Supp. 1980).

¹⁰¹ *Id.* at §44D.

¹⁰² *Id.* at §44D(1), (2). Similar considerations existed under the prior law, but no demonstration was required. *See* MASS. GEN. LAWS ANN. ch. 149, §44A (West Supp. 1980) (repealed 1980).

¹⁰³ MASS. GEN. LAWS ANN. ch. 149, §44A(1) (West Supp. 1980).

¹⁰⁴ *Id.* at §44D.

¹⁰⁵ *Id.* This evaluation process focuses exclusively on general contractors, the statute specifically excludes subcontractors from the evaluation process. *Id.* at §44D(9).

¹⁰⁶ MASS. GEN. LAWS ANN. ch. 149, §44D(1) (West Supp. 1980).

¹⁰⁷ MASS. GEN. LAWS ANN. ch. 149, §44D(1)(a) (West Supp. 1980). Specifically, the information includes the applicant's form of organization, its key personnel and principal owners, its experience on public and private construction projects over the past five years; and all legal or administrative proceedings currently pending against it or concluded adversely to it within the past five years which relate to public or private contracts. *Id.*

¹⁰⁸ *Id.* As part of the prequalification statement, an applicant must file a statement of financial condition from a certified public accountant. *Id.* This financial statement must delineate the applicant's current assets and liabilities, plant and equipment; bank and credit references, as well as its bonding capacity and bonding company. *Id.*

¹⁰⁹ MASS. GEN. LAWS ANN. ch. 149, §44D(1) (West Supp. 1980). The statement may be filed with the Commonwealth's Division of Capital Planning and Operations. *Id.*

quirements, the Deputy Commissioner of the Division of Capital Planning and Operations, authorized under the statute to prescribe a form for the prequalification statement,¹¹⁰ may require any additional information relevant to the qualifications and responsibility of the bidder.¹¹¹ The statement must be signed under the penalty of perjury.¹¹² Furthermore, a materially false statement may result in the termination of any contract awarded the applicant, and constitutes a ground for debarment from future public work.¹¹³ Access to prequalification statements is restricted to awarding authorities; they are not open to public inspection.¹¹⁴ While the prequalification statement supplies awarding authorities with the applicant's general characteristics, more specific information is submitted by the applicant in the application to bid.

Unlike the prequalification statement, the application to bid must be filed in conjunction with every contract in which an applicant has an interest.¹¹⁵ Primarily, the application to bid brings current the information contained in the prequalification statement.¹¹⁶ The application to bid also must include the percentage of uncompleted work on projects currently under contract by prospective bidders, as well as the dollar amount of all outstanding bids for contracts presently under negotiation.¹¹⁷ In addition, the statute requires that the applicant submit the names and qualifications of personnel who will have supervisory responsibility for the performance of the contract.¹¹⁸ The Deputy Commissioner of Capital Planning and Operations, pursuant to the statute,¹¹⁹ has prescribed a form for this application to bid.¹²⁰ In keeping with the statute's prescriptions, the Deputy Commissioner's form basically requires applicants to file an update of their prequalification statement, with the addition of the

¹¹⁰ MASS. GEN. LAWS ANN. ch. 149, §44D(1)(a) (West Supp. 1980). The Deputy Commissioner has prescribed such a form. See 1 MASS. ADMIN. REG. 11-19 (1980) (superseded). Recently, the form was revised and now calls for listings of construction projects under progress and recently completed, along with certain information regarding the contractor's performance on each project listed. See Deputy Commissioner of Capital Planning and Operations, *Guidelines for Prequalification Procedure*, issued on March 22, 1982, by the Deputy Commissioner of Capital Planning and Operations (unpublished) (hereinafter cited as NEW GUIDELINES).

¹¹¹ MASS. GEN. LAWS ANN. ch. 149, §44D(1)(a) (West Supp. 1980).

¹¹² *Id.*

¹¹³ *Id.* See *supra* notes 83-101 and accompanying text for a discussion of the new debarment mechanism.

¹¹⁴ MASS. GEN. LAWS ANN. ch. 149, §44D(1)(a) (West Supp. 1980). Two considerations entered into the decision to close prequalification statements to public inspection. First, the Special Commission felt that information included in the statements concerning an applicant's business organization and financial condition are not matters of public concern and should not be accessible to competitors. 8 FINAL REPORT, *supra* note 10, at 349. Second, the more publicity given to documents used for evaluation, the greater the danger, real or apparent, the Special Commission felt, of ensuing lawsuits. *Id.*

¹¹⁵ MASS. GEN. LAWS ANN. ch. 149, §44D(2) (West Supp. 1980).

¹¹⁶ See *id.*

¹¹⁷ *Id.* at §44D(1)(b).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ See 1 MASS. ADMIN. REG. 20, 28 (1981) (superseded).

names and resumes of supervising personnel who will be assigned to the project.¹²¹

In general the prequalification statement and the application to bid comprise the bases for evaluating the qualifications of a prospective bidder.¹²² But beyond the information contained in the statements filed by each prospective general bidder, the statute allows awarding authorities to consider written evaluations of the applicant's performance on private or public projects over the past five years whenever they are available.¹²³ The statute requires awarding authorities to evaluate each prospective general bidder within two weeks after the final date for the submission of the application to bid.¹²⁴

The statute also requires the Deputy Commissioner to issue regulations or guidelines governing the prequalification of a general bidder.¹²⁵ The statute states explicitly that, to the extent possible, the criteria for evaluation be assigned numerical values and weights, and the applicant be assigned an overall numerical rating on the basis of the criteria.¹²⁶

The guidelines are designed to yield accurate and uniform results regardless of who conducts the evaluation.¹²⁷ The guidelines consist of a complex system of weighted categories and ability ratings.¹²⁸ As described by the Deputy Commissioner, the system was not designed to be statistically precise, but rather to identify patterns of competence or incompetence in a prospective general bidder's record of performance.¹²⁹ The guidelines for evaluation are divided into four categories: (1) finished product quality; (2) performance and accountability; (3) experience; and (4) supervisory personnel.¹³⁰ Within each category there are various factors for specific evaluation.¹³¹ The "finished product quality" category has only one factor: general quality and workmanship.¹³² The guidelines, here, suggest various sources of information and evaluators are cautioned to look for patterns of quality rather than isolated cases.¹³³ There are eight factors within the "performance and accountability" category: (1) ability to manage subcontractors; (2) coordination and scheduling; working relationships with (3) owner/user agency, (4) designer, (5) subcontractors, (6) project manager; (7) construction procedures; and (8) processing paperwork.¹³⁴ Here, the guidelines suggest that, where time permits, the

¹²¹ *See id.*

¹²² MASS. GEN. LAWS ANN. ch. 149, §44D(3) (West Supp. 1980).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ NEW GUIDELINES, *supra* note 110, at 2.

¹²⁸ *See id.* at 2-8. *See also* Contractor Qualification Rating Form, 1 MASS. ADMIN. REGS. 29-31 (1980).

¹²⁹ NEW GUIDELINES, *supra* note 110, at 3.

¹³⁰ *Id.* at 2.

¹³¹ *Id.* at 2-3.

¹³² *Id.* at 4-5.

¹³³ *Id.*

¹³⁴ *Id.* at 5-6.

awarding authority gather information by contacting owners, architects, and subcontractors.¹³⁵ The "experience" category is divided into three factors: (1) similar types of construction; (2) similar level of complexity; and (3) similar dollar size of projects.¹³⁶ In the "supervisory personnel" category, there are four factors: (1) general performance; (2) general training and/or experience; (3) experience on projects of similar type; and (4) size and complexity.¹³⁷ In describing the procedure for evaluation, the Deputy Commissioner refers awarding authorities to specific components of the two prequalification statements for consideration of relevant information.¹³⁸

The original guidelines developed by the Deputy Commissioner were recently revised because they stood in conflict with the statute.¹³⁹ The Deputy Commissioner had originally required awarding authorities to apply a minimal threshold evaluation to all prospective general bidders.¹⁴⁰ All prospective bidders passing this minimal test were allowed to submit bids.¹⁴¹ After receiving bids, the awarding authority was instructed to apply the numerical evaluation, based on the information contained in the prequalification statement and the application to bid, to the low bidder.¹⁴² In order to qualify for receipt of the contract, the low bidder had to pass a rigorous evaluation.¹⁴³ Under the revised guidelines, the Deputy Commissioner complies with the statute and requires awarding authorities to apply the numerical evaluation to all prospective

¹³⁵ *Id.*

¹³⁶ *Id.* at 6-7.

¹³⁷ *Id.* at 7-8.

¹³⁸ *See id.* at 4-9. The evaluation is done in two steps. NEW GUIDELINES, *supra* note 110, 2. Two factors are considered at a threshold level of review. First, the applicant must have the bonding capacity to perform the project at its estimated cost. *Id.* at 22. Second, the applicant must have been in business under the same name for at least one year prior to the date of application. *Id.* Ineligibility to bid will result from failure to meet both of these requirements. *Id.* Next, the numerical evaluation is applied. Stated as simply as possible, it is as follows: each category is divided into several specific factors which are rated numerically, totalled, and averaged. 1 MASS. ADMIN. REGS. 29-31 (1980). *Id.* That average is given a weight depending on the category. *Id.* The performance and accountability rating is weighted most heavily, five times as much as either experience or supervisory personnel. *Id.*

The evaluator rates an applicant's qualifications for each factor within each of the four categories at one of five levels: unqualified (0); unsatisfactory (1); below average (2); average (3); or above average (4). *Id.* Next, the factor ratings are totalled for each category and averaged, then weighted according to category. *Id.* Finally, the weighted average categories are totalled to attain the final rating. *Id.*

¹³⁹ *See id.* at 1. The prior guidelines are published. *See* 1 MASS. ADMIN. REGS. 21-27 (1980) (superseded).

¹⁴⁰ *See* 1 MASS. ADMIN. REGS. 21-22 (1980) (superseded). *See also*, NEW GUIDELINES, *supra* note 110, at 1.

¹⁴¹ *See* 1 MASS. ADMIN. REGS. 21-22 (1980) (superseded).

¹⁴² *See id.*

¹⁴³ *See id.* at 21-27. The former guidelines stated:

It is a two phase process in which the first phase is a "Prequalification" to bid and the second phase is "Post-qualification" for the award of the contract. Under this system, being prequalified to bid does not automatically qualify the Contractor for award of the contract.

Id. at 21.

general bidders, rather than to solely the low bidder.¹⁴⁴ The rigor of the evaluation and its procedures have remained the same, despite awarding authorities now applying the guidelines to all prospective general bidders.¹⁴⁵

Failure to attain a minimum numerical rating based upon the evaluation means that an applicant will be declared ineligible to bid.¹⁴⁶ Those applicants determined to be ineligible to bid on a project after an adverse evaluation may either file written objections to the determination¹⁴⁷ or appeal in writing to the Commissioner of Labor and Industries.¹⁴⁸ The Commissioner may hold a hearing, but is not required by statute to do so.¹⁴⁹ The Commissioner's decision is final and binding, subject to any remedies at law available to the aggrieved applicant.¹⁵⁰

Prospective general bidders who attain a score at or above the minimum rating are then allowed to submit bids.¹⁵¹ From those general contractors submitting bids, the awarding authority must award the contract to the lowest responsible and eligible bidder.¹⁵² For a general bidder to be deemed responsible, he need only prequalify by satisfying the minimum rating.¹⁵³ Thus, all bidders, apparently, are deemed responsible. The statute is imprecise, however, on when a bidder is deemed eligible to receive a contract. To be eligible, a bidder must pledge to furnish appropriate labor.¹⁵⁴ In addition, only bidders not debarred are eligible.¹⁵⁵ Further, the statute provides that, in order to be eligible, a bidder must comply with the provisions of the entire competitive bidding statute.¹⁵⁶ Among the provisions of the competitive bidding statute affecting bidder eligibility, there are also those which grant awarding authorities the right to reject general bids. The statute permits awarding authorities to reject bidders for a variety of technical violations of bidding procedure.¹⁵⁷ The statute also permits awarding authorities to reject any, or all, general bids if it is deemed in the public interest to do so.¹⁵⁸ When rejection is in the public interest is not defined.¹⁵⁹ Thus, the statute is unclear whether an awarding

¹⁴⁴ See NEW GUIDELINES, *supra* note 110, at 1-7.

¹⁴⁵ See *id.* Cf. 1 MASS. ADMIN. REGS. 21-27 (1980) (superseded).

¹⁴⁶ NEW GUIDELINES, *supra* note 110, at 3. An applicant must attain a score of 70.0 to be qualified for award of a contract. *Id.* Under the formula prescribed, a rating of at least "average" is essential in the categories "finished product quality" and "performance and accountability." *Id.* These categories are weighted heavily. See *id.* A rating of "below average" in either of these categories will arithmetically disqualify the applicant. See *id.*

¹⁴⁷ MASS. GEN. LAWS ANN. ch. 149, §44D(6) (West Supp. 1980).

¹⁴⁸ *Id.* at §44D(7).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at §44D(3).

¹⁵² *Id.* at §44A(2).

¹⁵³ *Id.* at §44A(1).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ See *id.* at §44E(2), (3).

¹⁵⁸ *Id.* at §44E(1).

¹⁵⁹ See *id.*

authority may reject a general bidder who is deemed to be, for example, unqualified after a closer scrutiny of his competency even after prequalification.¹⁶⁰ The statute, then, does allow awarding authorities to reject certain general bidders after prequalification, at least on technical grounds. The extent of the right to reject general bidders, however, is unclear.

In summary, every prospective general bidder must undergo a review of its qualifications. Prospective general bidders must comply with a two-step disclosure. First, they must file annually a prequalification statement which includes general information regarding their business organization, financial status, and employment history. Second, in conjunction with a desire to bid on a particular contract, a general contractor must submit an application to bid containing an update of the prequalification statement and more detailed information of its qualifications for that particular contract. Using these disclosure documents, an awarding authority evaluates all prospective general bidders according to a complex numerical system designed to objectively analyze general bidder qualifications. General contractors obtaining a favorable evaluation are, then, allowed to submit bids. Although awarding authorities may yet reject a general bidder, the extent of that statutory right is unclear.

C. Subbidders

Since the new competitive bidding statute retains, with incidental revisions,¹⁶¹ the filed subbid system of the old law, the selection of subcontractors remains essentially unchanged. Under the former statute, as explained above,¹⁶² subcontractors were selected through a filed subbid system. Under the filed subbid system of the former statute, the Special Commission found that neither awarding authorities nor general contractors considered the competency of subbidders.¹⁶³ The filed subbid system does not provide for a prequalification evaluation as is required for prospective general bidders. The Special Commission decided to withhold recommendation for formal qualification review of subbidders because it believed that the practical burden of reviewing all subbidders would make the system unworkable.¹⁶⁴ There remains, nonetheless, a discretionary power, without guidelines, by which

¹⁶⁰ See NEW GUIDELINES, *supra* note 110, 9. The Deputy Commissioner states that: [n]othing in these GUIDELINES should be construed to require an award to a bidder whose submitted background information, when investigated and verified by the Awarding Authority, raises significant questions as to his ability to successfully complete the project in question due to problems with his competence and responsibility.

Id.

The Deputy Commissioner falls short of stating that the law permits such a rejection.

¹⁶¹ Compare MASS. GEN. LAWS ANN. ch. 149, §44I (West 1971) (repealed 1980) with MASS. GEN. LAWS ANN. ch. 149, §44F (West Supp. 1980).

¹⁶² See *supra* notes 18-39 and accompanying text for a description of filed subbidding.

¹⁶³ See *supra* notes 59-68 and accompanying text for the Special Commission's findings regarding filed subbidding.

¹⁶⁴ 8 FINAL REPORT, *supra* note 10, at 350.

awarding authorities may evaluate subbidders.¹⁶⁵ The new law requires that the question of subbidders' competency receive some consideration, but not in the context of the filed subbid system.

Under the new law, subcontractors are subject to debarment.¹⁶⁶ As noted above, debarment may be imposed for a variety of criminal or non-criminal conduct.¹⁶⁷ A debarred subcontractor will be prohibited from bidding on public construction contracts for a certain period of time.¹⁶⁸ Subcontractors are also indirectly accounted for by the prequalification evaluation to which each prospective general contractor must submit.¹⁶⁹ Because the general bidder's selection of subbidders is made subsequent to his qualification review,¹⁷⁰ subbidder qualifications do not undergo direct scrutiny during prequalification. The prequalification evaluation, however, does examine a general contractor's relationship with subcontractors in the past.¹⁷¹ This examination, embodied in several factors within the evaluation, creates a new incentive for general contractors to be concerned about subbidders beyond their price.¹⁷² Adverse relationships with subcontractors may now affect a general contractor's ability to prequalify.¹⁷³

The new competitive bidding statute, then, retains the filed subbid system. Although subcontractors were not subject to any sort of evaluation in the past under the filed subbid system, the new competitive bidding statute's addition of debarment and prequalification to the filed subbid system effects a slight change in the treatment of subcontractors. Debarment will prevent certain subcontractors from participating in bidding. Prequalification of general bidders forces general bidders to consider, tangentially, their ability to complete projects satisfactorily with the subcontractors they choose.

III. ANALYSIS AND RECOMMENDATIONS

The Special Commission's overriding criticism of the former system of competitive bidding¹⁷⁴ was its failure appropriately to account for the qualifica-

¹⁶⁵ See *supra* notes 28-32 and accompanying text.

¹⁶⁶ MASS. GEN. LAWS ANN. ch. 149, §44C(1) (West Supp. 1980).

¹⁶⁷ See *supra* notes 83-101 and accompanying text for a description of the new debarment mechanism.

¹⁶⁸ See *id.*

¹⁶⁹ See *supra* notes 102-160 and accompanying text for a description of prequalification.

¹⁷⁰ General contractors must prequalify before they are allowed to submit bids. MASS. GEN. LAWS ANN. ch. 149, §44D(3) (West Supp. 1980). Filed subbidder lists are sent only to prequalified general contractors. *Id.* at §44F(3).

¹⁷¹ One component of the prequalification evaluation takes into account a general contractor's ability to manage subcontractors. See NEW GUIDELINES, *supra* note 110, at 5-6.

¹⁷² See *id.* See also *supra* notes 64-68 and accompanying text for a general discussion of a general contractor's lack of incentive to review subbidder qualifications in the past.

¹⁷³ See NEW GUIDELINES, *supra* note 110, at 5-6. A general contractor's score for management of subcontractors will have an effect on his overall score. Theoretically, then, a poor score may contribute to his failure to prequalify. See *id.*

¹⁷⁴ See *supra* notes 49-77 and accompanying text for the Special Commission's findings.

tions of bidders before contracts were awarded. This failure to account for bidders' qualifications permitted many unqualified bidders to obtain public construction contracts.¹⁷⁵ The Special Commission found that as a result of allowing unqualified bidders to obtain contracts, the quality of public buildings was poor.¹⁷⁶ The new competitive bidding statute reacts to the Special Commission's grievance by subjecting contractor qualifications to two stages of scrutiny. First, the new statute authorizes the Deputy Commissioner of Capital Planning and Operations to debar general contractors and subcontractors with seriously deficient records of management or contract performance.¹⁷⁷ Debarment will ban contractors from bidding on any contract awarded under the competitive bidding statute for a period of up to five years.¹⁷⁸ Second, the statute prescribes a system of disclosure and evaluation of general bidder qualifications. General bidders annually must disclose certain information regarding their qualifications.¹⁷⁹ Then, in conjunction with their desire to bid on a *particular* contract, general contractors must provide awarding authorities with certain additional, detailed information regarding their specific qualifications for that particular contract.¹⁸⁰ Using this data, awarding authorities are then required to evaluate the qualifications of each prospective general bidder according to guidelines developed by the Deputy Commissioner of Capital Planning and Operations.¹⁸¹ The new statute, however, does not require such disclosure and evaluation of subbidders' qualifications.¹⁸² This section will analyze whether the new mechanisms for evaluating bidders will be adequate enough to prevent unqualified bidders from obtaining public construction contracts. If the new mechanisms for evaluating bidders fail to prevent unqualified bidders from obtaining contracts, then it is likely that the quality of public buildings will continue to be poor.

Because the new competitive bidding statute subjects contractor qualifications to two stages of scrutiny, this section is divided into two subsections. The first subsection will evaluate the likely effect of the new debarment provisions in preventing contractors with poor records of management or contract performance from participating in the competitive bidding system under the new statute. The devices designed to prevent such contractors from participating in the competitive bidding system under the former statute will be compared to the new device of the debarment. Then, because the Massachusetts debarment provisions are modeled on federal debarment regulations, the Massachusetts debarment provisions will be scrutinized in light of the operation of the federal debarment regulations. Next, this subsec-

¹⁷⁵ See *supra* notes 50-51 and accompanying text.

¹⁷⁶ See *supra* notes 74-75 and accompanying text.

¹⁷⁷ See *supra* notes 83-101 and accompanying text.

¹⁷⁸ See *supra* notes 83-101 and accompanying text.

¹⁷⁹ See *supra* notes 106-114 and accompanying text.

¹⁸⁰ See *supra* notes 115-122 and accompanying text.

¹⁸¹ See *supra* notes 123-151 and accompanying text.

¹⁸² See *supra* notes 161-173 and accompanying text.

tion draws conclusions regarding the use of debarment in Massachusetts as an effective tool in preventing contractors with poor records of performance from participating in public construction contract bidding. It will be submitted that the comparative lack of federal debarments foreshadows a similar development under Massachusetts law. Thus, debarment may not serve as an effective tool in preserving the integrity of the bidding process. Because debarment may not prevent contractors with poor records of performance from entering the bidding competition, in the second subsection, the inquiry turns to whether the new provisions designed to prevent unqualified contractors from bidding on particular contracts will succeed.

The second subsection will compare the provisions which were designed to prevent unqualified contractors from obtaining particular contracts under the new statute. Because the new prequalification system applies to general contractors and does not apply to subcontractors, this subsection will compare separately the old and new mechanisms for preventing unqualified general contractors from obtaining particular contracts and the old and new mechanisms for preventing unqualified subcontractors from obtaining particular contracts. The first part of this second subsection will compare the provisions awarding authorities could employ to prevent unqualified general contractors from obtaining particular contracts under the former statute to the prequalification provisions awarding authorities must use to prevent unqualified general contractors from obtaining particular contracts under the new statute. Here, a lengthy evaluation will be devoted to whether the new prequalification provisions will, in theory or practice, root out the causes cited by the Special Commission for the former provision's failure to prevent unqualified general contractors from obtaining particular contractors. It will be submitted that, while perhaps for other reasons, the causes for the former statute's failure will endure under the new prequalification provisions and undermine its effectiveness in preventing unqualified contractors from obtaining particular contracts. The second part of the second subsection will compare briefly the provisions useful to prevent unqualified subcontractors from obtaining particular contracts under the former statute with the provisions useful to prevent such subcontractors from obtaining particular contracts under the new statute. That these provisions are virtually identical obviates the need for an extended comparison. Inquiry, then, turns to whether the new statute's addition of debarment, which applies to general contractors and subcontractors, or prequalification, which applies exclusively to general contractors, will reverse the Special Commission's finding that the identical filed subbid provisions failed to generate any scrutiny of subbidder qualifications under the former law. It will be submitted that debarment and prequalification will not substantially increase the amount of consideration given to subcontractor qualifications. Thus, just as the Special Commission found that unqualified subbidders were awarded contracts and performed poorly under the former statute, the new statute without modification will result in the award of contracts to unqualified subbid-

ders who perform poorly. Finally, several recommendations will be made to alter present administrative practices, or the statute itself, in order to avoid the problems created by a failure to account for qualifications of subbidders before contracts are awarded.

A. Preventing Contractors With Records of Poor Management and Contract Performance From Participating in the Competitive Bidding Process

Despite its comprehensive nature,¹⁸³ the debarment remedy under the new competitive bidding statute may not be much more successful than those express means available to the Deputy Commissioner of Capital Planning and Operations for preventing contractors with poor records of management and contract performance by which bidders were barred from contracting with public agencies preexisting the new competitive bidding statute. The new debarment remedy has several facets. Debarment under the new competitive bidding statute may be implemented against a large number of individuals and firms engaging in the public construction industry.¹⁸⁴ A contractor may be debarred for engaging in certain criminal and non-criminal activities which tend to indicate a lack of business integrity.¹⁸⁵ Debarment may last up to five years depending on the seriousness of the offense, during which time a contractor is prohibited from bidding or working on public construction projects.¹⁸⁶ The authority to debar is centralized in the Deputy Commissioner of Capital Planning and Operations.¹⁸⁷ The Deputy Commissioner's authority is limited by certain procedural rights granted by statute to contractors facing debarment.¹⁸⁸ These many facets of the new competitive bidding statute's debarment remedy make the remedy far more comprehensive than that which predates its enactment.¹⁸⁹ Before the new debarment provisions were adopted, there were two grounds on which a contractor could be debarred from contracting: violation of an administratively determined wage rate or violation of Executive Order 147.¹⁹⁰ Debarment resulting from violation of the prevailing wage rate only indirectly prevents contractors with poor records of performance from contracting with public agencies.¹⁹¹ Fear of violating the prevailing wage rate compels contractors to pay public construction workers a decent wage. Mandating that general contractors and subcontractors pay their laborers a decent wage for public construction work, perhaps, helps ensure the quality of the workmanship on construction of public buildings. Yet, because

¹⁸³ See *supra* notes 83-101 and accompanying text for a discussion of the new debarment mechanism.

¹⁸⁴ See MASS. GEN. LAWS ANN. ch. 149, §44C(1) (West Supp. 1980).

¹⁸⁵ See *id.* at §44C(3). See *supra* notes 85-86 and accompanying text.

¹⁸⁶ MASS. GEN. LAWS ANN. ch. 149, §44C(1), (7) (West Supp. 1980).

¹⁸⁷ *Id.* at §44C(2), (3), (4), (5).

¹⁸⁸ *Id.* at §44C(5).

¹⁸⁹ See *supra* notes 41-48 and accompanying text.

¹⁹⁰ See *id.*

¹⁹¹ See 8 FINAL REPORT, *supra* note 10, at 346.

violations of the prevailing wage rate, at most, indirectly suggest that the offenders produce a lower quality product, such violations neither satisfactorily measure records of performance nor sufficiently indicate abilities to adequately perform in the future. Debarment for violations of the wage rate, therefore, had little bearing on the quality of work performed. Debarment for violating Executive Order 147 more closely approximates debarment under the competitive bidding statute than debarment for violating the prevailing wage rate. Under Executive Order 147, general contractors and subcontractors guilty of certain crimes related to obtaining or performing public contracts, or reflecting adversely on a contractor's business integrity, may be suspended or debarred from contracting with public agencies.¹⁹² The executive order is directed at curing the same ills as debarment under the new competitive bidding statute: preventing contractors which have demonstrated a likelihood of performing inadequately from obtaining contracts. The executive order contains almost the same procedures and standards for imposing debarment as are included within the debarment provisions of the new competitive bidding statute.¹⁹³ Despite the presence of these procedures and standards for imposing the sanctions under the executive order, the Special Commission found that those sanctions have never been imposed pursuant to Executive Order 147.¹⁹⁴ The presence of arduous procedures and standards for imposing suspension and debarments under the executive order, however, may have frustrated their imposition. Likewise, the presence of procedures and standards in the new debarment provisions may inhibit the number of times debarment is invoked to prevent contractors with chronic performance problems from participating in public bidding competition. Because Massachusetts debarment provisions were modeled on federal debarment regulations means that similar administrative considerations may apply in decisions to invoke debarment, an examination of the impact which the same procedures have had on the use of debarment at the federal level is warranted.

Authors of the new competitive bidding statute modeled its debarment provisions on federal procurement regulations for debarment.¹⁹⁵ As under present Massachusetts law, federal debarment regulations provide that debarment may not be imposed until strict procedural requirements are satisfied.¹⁹⁶ Federal debarment regulations provide that a contractor facing debarment must be given notice and an opportunity for a hearing.¹⁹⁷ Hearings must satisfy the demands of fairness and, at a minimum, must allow information against the proposed action to be submitted in writing, in person or by an ap-

¹⁹² Executive Order 147 issued October 31, 1979 by Governor Dukakis.

¹⁹³ *See id.*

¹⁹⁴ *See* 8 FINAL REPORT, *supra* note 10, at 346.

¹⁹⁵ 8 FINAL REPORT, *supra* note 10, at 353. *See* Federal Procurement Regulations, 41 C.F.R. 1-1.600-.607 (1981) (debarment provisions).

¹⁹⁶ *See* 41 C.F.R. §1-1.604-1 (1981).

¹⁹⁷ 41 C.F.R. §1-1.604-1 (1981).

propriate representative.¹⁹⁸ The Fifth Circuit Court of Appeals, in the leading case of *Gonzalez v. Freeman*,¹⁹⁹ written by then Circuit Judge Warren Burger, has suggested that only a full trial-type hearing will satisfy the procedural requirements for federal debarments,²⁰⁰ while holding that a debarred contractor had standing to sue and that debarment was subject to judicial review.²⁰¹

Under the federal procurement regulations a contractor also may be suspended from receiving contract awards during the course of investigating allegations of certain criminal and non-criminal acts.²⁰² Because suspension, if prolonged, can become a de facto debarment, the District of Columbia Court of Appeals in *Horne Bros., Inc. v. Laird*²⁰³ required that a suspended individual or firm be given notice of the charges and an opportunity for rebuttal whenever a substantial period of suspension is contemplated.²⁰⁴ The procedural guarantees granted for suspension in *Horne Brothers* are nearly as complete as those guarantees which courts have granted firms facing debarment.²⁰⁵ The Special Commission felt that suspension prior to any hearing was an unduly harsh measure, unnecessary to counter the risk that a contractor under suspicion of serious wrongdoing might be awarded a public contract prior to debarment.²⁰⁶

After surveying instances where federal debarment and suspension have been imposed, one commentator has concluded that such actions occur infrequently despite the existence of an elaborate statutory and regulatory

¹⁹⁸ *Id.*

¹⁹⁹ 334 F.2d 570 (D.C. Cir. 1964).

²⁰⁰ *Id.* at 578.

The governmental power must be exercised in accordance with basic legal norms. Considerations of basic fairness require administrative regulations establishing standards for debarment and procedures which will include notice of specific charges, opportunity to present evidence and to cross-examine adverse witnesses all culminating in administrative findings and conclusions based upon the record so made.

Id. Cf. C. Reich, "The New Property," 73 YALE L.J. 733, 755 (1969).

²⁰¹ *Gonzalez v. Freeman*, 334 F.2d 570, 580 (D.C. Cir. 1964). The narrow holding of the case was that while the statute establishing the Commodity Credit Corporation by implication authorized such debarment, Congress did not intend to authorize such debarment "without either regulations establishing standards and a procedure which are both fair and uniform or basically fair treatment of appellants." *Id.*

²⁰² 41 C.F.R. 1-1.605 (1981) (suspension provisions).

²⁰³ 463 F.2d 1268 (D.C. Cir. 1972).

²⁰⁴ *Id.* at 1270-71.

²⁰⁵ See *supra* notes 200-01 and accompanying text.

²⁰⁶ There are numerous federal statutes and regulations which authorize debarment. In general, eight federal statutes authorize debarment: Buy American Act (41 U.S.C. §10b(b) (1964)), Davis-Bacon Act (40 U.S.C. §276a-2(a) (1969)), Walsh-Healy Act (41 U.S.C. §37 (1964)), Clean Air Act (42 U.S.C. §7401), Service Contract Act (41 U.S.C. §354 (1970)), Water Pollution Act (33 U.S.C. §1368 (1976)), Anti-Kickback Act (41 U.S.C. §51 (1964)), and the Contract Work Hours Standards Act (40 U.S.C. §327 (1964)). There are also federal regulations authorizing debarment and suspension, see Armed Services Procurement Regulation 32 C.F.R. 1-600-610 (1981), and Federal Procurement Regulations 41 C.F.R. 1-1.600-.607 (1981). Refinements in federal government debarment and suspension have recently been proposed. 46 *Fed. Reg.* 37,832 (1981). The proposal concerns: (1) establishing a consolidated list of debarred,

framework.²⁰⁷ Moreover, several commentators have suggested that the stringent procedures required for debarment are the cause for its infrequent imposition.²⁰⁸ Instead, they submit, federal awarding authorities seek to accomplish the same goal of preventing certain contractors from obtaining work by resort to less procedurally cumbersome means.²⁰⁹ Similar considerations regarding the strict procedural requirements for imposing debarments may encourage the Deputy Commissioner of Capital Planning and Operations in Massachusetts to forsake debarment in favor of less procedurally strict means of frustrating attempts by undesirable contractors to acquire public construction contracts which are available.²¹⁰ Thus, because of the procedural standards which the competitive bidding statute requires prior to its imposition, debarment may not frequently be imposed in Massachusetts. If debarment is not imposed without regard to its procedural requirement, contractors likely to perform inadequately will move on to the second stage of qualification scrutiny without impediment. As explained below, following an analysis of the second stage of qualification scrutiny, permitting such contractors to avoid debarment and continue on to the prequalification phase of scrutiny may have a special negative impact on the integrity of the entire competitive bidding process.

B. Preventing Unqualified Contractors From Obtaining a Particular Contract

Apart from the Deputy Commissioner of Capital Planning and Operations's authority to prevent contractors likely to perform inadequately from participating in public bidding competition on a system-wide basis through debarment, every awarding authority is accorded an opportunity to prevent contractors from obtaining certain contracts.²¹¹ While the new competitive bidding statute has drastically altered the procedures available to awarding authorities for reviewing general contractor qualifications prior to the award of a particular contract,²¹² it has retained those procedures which were formerly applicable to subcontractors.²¹³ The divergent treatments of general contractors and subcontractors are discussed separately below.

suspended, and ineligible contractors; (2) the government-wide effect of administrative debarments and suspensions; and (3) establishing uniform procedures for imposing administrative debarments and suspensions. *Id.*

²⁰⁷ Steadman, "'Banned in Boston - and Birmingham and Boise and . . . ' Due Process in the Debarment and Suspension of Government Contractors," 27 HASTINGS L.J. 793, 814-21 (1976).

²⁰⁸ *Id.* at 817. See Morgan, "Achieving National Goals Through Federal Contracts: Giving Form to an Unconstitutional Administrative Process," 1974 WIS. L. REV. 301, 336 (1974).

²⁰⁹ See Steadman, *supra* note 207, at 814. See also Morgan, *supra* note 208, at 336.

²¹⁰ The Deputy Commission may disqualify contractors of the prequalification stage of scrutiny without granting contractors the procedural safeguards of debarment. See *supra* notes 146-150 and accompanying text.

²¹¹ See *supra* notes 102-160 and accompanying text for a discussion of provisions applicable to general contractors and *supra* notes 161-173 and accompanying text for provisions applicable to subcontractors.

²¹² See *supra* notes 102-160 and accompanying text and compare *supra* notes 11-48 and accompanying text.

²¹³ See *supra* notes 161-173 and accompanying text.

1. General Contractors

The new competitive bidding statute has made major changes in the procedures available to awarding authorities for use in preventing unqualified general contractors from obtaining particular contracts.²¹⁴ The former statute gave awarding authorities no guidelines for disqualifying general bidders, but did allow them to disqualify general bidders prior to the award of a particular contract.²¹⁵ According to the Special Commission, no serious effort was made to disqualify general bidders with poor records of performance because authorities were fearful that they would lack the means to defend their decision if disqualified bidders brought suits challenging their disqualifications.²¹⁶ The lack of documentation of a general contractor's prior performance, staffing to check references supplied by bidders, and legal counsel to frame appropriate disqualification procedures, made the decision to disqualify a certain general contractor particularly problematic for awarding authorities.²¹⁷

The new competitive bidding statute attempts to remedy awarding authorities' reluctance to disqualify unqualified bidders by implementing a two-step prequalification system for general contractors. First, all prospective general bidders are required to submit certain information to awarding authorities regarding their qualifications for a particular contract.²¹⁸ Second, all awarding authorities are required to conduct an evaluation of prospective general bidders based in part on the information supplied and according to procedures prescribed by statute and administrative guidelines.²¹⁹

Through its requirement that all general bidders be evaluated prior to the submission of bids, the new prequalification system provides some assurance that only qualified general contractors will obtain public construction contracts.²²⁰ The new prequalification system requires an evaluation of every prospective general bidder.²²¹ Requiring an evaluation, in itself, assures that awarding authorities will devote considerably more attention to the qualifications of their bidders than they had previously. Requiring an evaluation prior to the submission of bids also should guarantee a pool of qualified bidders, to the lowest of whom an awarding authority must award the contract.

The Special Commission cited the lack of documentation regarding a contractor's record of performance available to an authority as a reason awarding authorities questioned their ability to perform an evaluation which would hold up in court.²²² The new statute gives awarding authorities the documentation they lacked in the past by requiring a two-step disclosure by general contrac-

²¹⁴ See *supra* notes 102-160 and accompanying text.

²¹⁵ See *supra* notes 11-17 and accompanying text.

²¹⁶ See *supra* notes 52-54 and accompanying text.

²¹⁷ See *supra* notes 55-58 and accompanying text.

²¹⁸ See *supra* notes 106-114 and accompanying text.

²¹⁹ See *supra* notes 115-122 and accompanying text.

²²⁰ See *supra* notes 11-17 and accompanying text.

²²¹ MASS. GEN. LAWS ANN. ch. 149, §44D(3) (West Supp. 1980).

²²² 8 FINAL REPORT, *supra* note 10, at 345.

tors. First, all prospective general bidders must file an annual disclosure document which contains certain basic business organization and financial information.²²³ Second, prospective general bidders must file with a specific awarding authority, in conjunction with each contract in which they have an interest, a more detailed disclosure of their particular qualifications for that contract.²²⁴ Together, these filings will provide awarding authorities with an enormous amount of information about the business organization, financial status, and performance record and capability of prospective general bidders.²²⁵

Faced with all of this information, awarding authorities are required to synthesize the relevant facts and figures through a complex system of weighted categories and ability ratings for every prospective general bidder within two weeks.²²⁶ Because the new statute does not address the staffing inadequacies that awarding authorities previously faced, this task may create an administrative nightmare. With limited support staffs, awarding authorities are asked to carry out a complex evaluation for every prospective general bidder. Thus, compliance with the statute's prescription to carry out such an evaluation for all prospective general bidders will be difficult, if not impossible. Yet, if awarding authorities fail to comply with the statute, disappointed bidders may sue to enforce the statute. Under the former statute, the Massachusetts Supreme Judicial Court held that bidders have standing to challenge compliance of an awarding authority with requirements of the law.²²⁷ If fear of lawsuits prevented awarding authorities from disqualifying contractors in the past,²²⁸ the new statute may produce a fear of lawsuits that will make awarding authorities hesitant to award contracts.

By requiring general contractors to provide awarding authorities with information relevant to their qualifications to perform a particular contract and by prescribing procedures for conducting evaluations of that information, the new prequalification system, in large part, mollifies awarding authorities' fear that a disqualified bidder will bring a suit challenging his disqualification and, thus, encourages awarding authorities to disqualify whichever general bidders they deem appropriate. But because these new procedures are complex, they may confound awarding authorities. Moreover, they may breed new fears of litigating the validity of a disqualification of even the award of a contract. Despite its many new procedural requirements, the new statute does nothing to alleviate the understaffing problem cited by the Special Commission. Concomitantly, the new procedures require awarding authorities to evaluate numerous prospective general bidders by a means that is likely to be labor-intensive. The new prequalification system exacerbates the problem awarding

²²³ See *supra* notes 106-114 and accompanying text.

²²⁴ See *supra* notes 115-122 and accompanying text.

²²⁵ See *id.*

²²⁶ MASS. GEN. LAWS ANN. ch. 149, §44D(3) (West Supp. 1980).

²²⁷ *Quincy Ornamental Iron Works, Inc. v. Findler*, 353 Mass. 85, 228 N.E.2d 453 (1967).

²²⁸ See *supra* notes 55-58 and accompanying text.

authorities had in conducting evaluations under the former statute because of inadequate support staff. That the new Massachusetts prequalification system is novel, then, should come as no surprise. States that prequalify bidders and the federal government present two alternative procedures for preventing unqualified contractors from receiving particular contracts.

The Special Commission expressly rejected the approach used by most states that prequalify contractors.²²⁹ Most other states that prequalify contractors do so, not for individual contracts, but for certain types of contracts on a system-wide basis.²³⁰ In such states, contractors interested in being considered for public work are required to file a general prequalification statement with an agency in advance of bidding on public projects.²³¹ In California, for example, the agency evaluates bidders and classifies them only according to maximum dollar amount and experience in performing public contracts.²³² Bidders are then allowed only to bid on contracts of the size and type within their classification.²³³

The Special Commission believed that prequalifying contractors in a centralized classification system would produce an administrative burden on the Division of Capital Planning and Operations.²³⁴ This view seems ironic when the administrative burden of a centralized classification system is compared with the administrative burden imposed on all awarding authorities throughout the state to evaluate every prospective general bidder each time he expresses an interest in bidding on a particular contract.²³⁵ The Special Commission acknowledged that its recommended prequalification system might produce an administrative burden on certain awarding authorities.²³⁶ The statute, thus, expressly grants any awarding authority the right to cede its responsibility to conduct the evaluations to the Division of Capital Planning and Operations.²³⁷ If awarding authorities avail themselves of this option, as might be expected from the discussion above,²³⁸ the Division of Capital Planning and Operations will be burdened with far more work than a centralized classification system would have produced.

The federal system for preventing unqualified contractors from obtaining contracts was not considered by the Special Commission. Federal government

²²⁹ 8 FINAL REPORT, *supra* note 10, at 350-51.

²³⁰ 8 FINAL REPORT, *supra* note 10, at 350-51. See e.g., N.J. STAT. ANN. §27:7-35.1-35.12 (West Supp. 1981); CAL GOV'T CODE §14311 (West 1980) (uniform rating system). See Note, *Due Process In Public Contracts: Pre-Award Hearings To Determine Responsibility Of Bidders*, 5 PACIFIC L.J. 142, 146-48 (1979) (description of prequalification in California).

²³¹ See, e.g., N.J. STAT. ANN. §27:7-35.3 (West Supp. 1981); CAL GOV'T CODE §14311 (West 1980).

²³² CAL GOV'T CODE §14311 (West 1980).

²³³ *Id.*

²³⁴ 8 FINAL REPORT, *supra* note 10, at 351.

²³⁵ See *supra* notes 123-160 and accompanying text.

²³⁶ 8 FINAL REPORT, *supra* note 10, at 348.

²³⁷ MASS. GEN. LAWS ANN. ch. 149, §44D(5) (West Supp. 1980).

²³⁸ See *supra* notes 224-228 and accompanying text.

agencies are required by statute and regulation to determine whether a particular bidder is responsible before awarding him the contract.²³⁹ Prospective contractors must satisfy the federal awarding authority that they are responsible.²⁴⁰ This responsibility determination is made at the time a contract is awarded.²⁴¹ Criteria similar to those used in Massachusetts to evaluate prospective general bidders are also considered by the federal government.²⁴² The federal responsibility determination, however, in no way involves a formalized evaluation of those criteria.²⁴³

Probably, the Special Commission assumed that the federal system would generate no different affect on the number of unqualified contractors receiving contracts than the then-existing system in Massachusetts.²⁴⁴ Neither the federal system nor the former Massachusetts system guarantees that an awarding authority will closely scrutinize the qualifications of a general contractor. Yet, when compared to the triage atmosphere created by the newly prescribed prequalification system,²⁴⁵ the federal system and former Massachusetts system seem attractive.

The Deputy Commissioner forestalled the prequalification crisis for almost a year by issuing guidelines that allowed awarding authorities to apply the statutorily prescribed evaluation only to the lowest bidder.²⁴⁶ This form of evaluation was permitted, despite the express statutory requirement that the evaluation be performed on all prospective general bidders.²⁴⁷ Recently, the guidelines were revised to conform with the statute.²⁴⁸ The new, revised, guidelines leave unstated whether an awarding authority may disqualify a contractor for lack of competence after accepting his bid.²⁴⁹

²³⁹ See 10 U.S.C. §2305(c) (1976); 32 C.F.R. §1-902 (1981); 41 U.S.C. §253(b) (1964); 41 C.F.R. §1-2.407-2.

²⁴⁰ See, e.g., 32 C.F.R. §1-904 (1981); 41 C.F.R. §1-1.1202 (1981).

²⁴¹ See, e.g., 32 C.F.R. §1-904 (1981).

²⁴² See *supra* notes 106-160 and accompanying text for Massachusetts considerations and compare elements included in federal responsibility determinations listed in P. LATHAM, GOVERNMENT CONTRACT DISPUTES 88-89 (1980). Among the federal criteria are adequate financial resources to perform the contract and a satisfactory record of performance and integrity. *Id.*

²⁴³ See 32 C.F.R. §1-905 (1981).

²⁴⁴ See *supra* notes 11-17 and accompanying text for a description of the discretionary review of general contractor competency under the former Massachusetts statute. See also *supra* notes 52-58 and accompanying text for the effect of the former provision.

²⁴⁵ See *supra* notes 224-228 and accompanying text.

²⁴⁶ See *supra* notes 139-143 and accompanying text.

²⁴⁷ See MASS. GEN. LAWS ANN. ch. 149, §44D(3) (West Supp. 1980).

²⁴⁸ See *supra* notes 144-45 and accompanying text.

²⁴⁹ See NEW GUIDELINES, *supra* note 110, at 9.

Nothing in these GUIDELINES should be construed to require an award to a bidder whose submitted background information, when investigated and verified by the Awarding Authority, raise significant questions as to his ability to successfully complete the project in question due to problems with his competence and responsibility.

Id.

The right to reject general bidders "in the public interest" would allow awarding authorities another opportunity to prevent unqualified contractors from obtaining the contract.²⁵⁰ It is clear under the statute that only general contractors who have received a positive evaluation are eligible to submit bids.²⁵¹ The statute is unclear, however, whether an awarding authority, once it has accepted bids, may subsequently reject the low bid on the grounds that the bidder is unqualified. An awarding authority may desire to reject a bidder subsequent to prequalification if new facts arise which cast a negative light on whether the bidder can properly perform. Awarding authorities are directed to award contracts to the "lowest responsible and eligible general bidder."²⁵² A general contractor satisfies the responsibility element by successful prequalification.²⁵³ To be deemed eligible, a general contractor must meet all the requirements of the competitive bidding statute, not be debarred, and must make certain promises regarding his ability to furnish appropriate labor for the work.²⁵⁴ One determination of eligibility is made prior to the submission of bids in conjunction with the satisfactory completion of the prequalification process.²⁵⁵ Subsequent to that determination, authorities are permitted to reject individual bids received if they are "incomplete, conditional, or obscure."²⁵⁶ Of course, a contractor can be debarred subsequent to the submission of a bid and that debarment would prohibit his receipt of the contract. Among the grounds for debarment is if the contractor willfully supplies materially false information to the awarding authority during the prequalification process.²⁵⁷ Finally, any materially false statement in the prequalification disclosure documents may, in the discretion of the awarding authority, result in the termination of any contract awarded to the contractor based on these documents.²⁵⁸ Thus, the statute does not expressly permit an awarding authority to reject a *bidder* solely on the grounds that he is unqualified. The statute does, however, state that "[i]n inviting bids, the awarding authority shall reserve the right to reject any or all such general bids, if it be in the public interest to do so."²⁵⁹ Obviously, resolution of the question whether a lack of competence justifies rejection of a bid in the public interest would clarify the statute. The Massachusetts courts, however, have not set out the appropriate parameters of public interest justifications for the rejection of general bids. Intuitively, the right to reject general bids submitted by unqualified bidders

²⁵⁰ See *supra* notes 158-60 and accompanying text. See also MASS. GEN. LAWS ANN. ch. 149, §44E(1) (West Supp. 1980).

²⁵¹ See MASS. GEN. LAWS ANN. ch. 149, §44D(3), (4) (West Supp. 1980). See also *supra* notes 151-52 and accompanying text.

²⁵² MASS. GEN. LAWS ANN. ch. 149, §44A(2) (West Supp. 1980).

²⁵³ *Id.* at §44A(1) (definition of "Responsible").

²⁵⁴ *Id.* at §44A(1) (definition of "Eligible").

²⁵⁵ *Id.* at §44D(3).

²⁵⁶ *Id.* at §44E(2).

²⁵⁷ *Id.* at §44C(3)(b).

²⁵⁸ *Id.* at §44D(1)(a).

²⁵⁹ *Id.* at §44E(1).

seems well within the scope of the public interest, especially in light of the new statute's focus on preventing unqualified contractors from obtaining contracts. If this right to reject is recognized, it must be limited to circumstances where new facts have come to the attention of the awarding authority that sufficiently compel reversal of the determination that the contractor was prequalified. Otherwise, an awarding authority could circumvent the prequalification system by performing its qualification evaluation solely on the low bidder. To remain consistent with the statute, then, this right to reject, if recognized, should force an awarding authority to resubmit the bidder to the prequalification evaluation taking into account the new information in its possession. If the bidder then fails to attain a minimum level of competence, he should be rejected.

In order to avert what it perceived to be certain procedural problems, the Special Commission intentionally recommended that the evaluation of qualifications take place prior to the submission of bids and that the evaluation be highly structured.²⁶⁰ The Special Commission believed that the practice of evaluating a contractor only after it was identified as the low bidder increased the likelihood that rejection of the bidder would be challenged and result in litigation.²⁶¹ By requiring the development of standard procedures for evaluation,²⁶² the Special Commission sought to prevent biased or arbitrary administration of the system, presumably to avoid judicial reversal of adverse qualification evaluations.²⁶³

Without the right to reject unqualified bidders, however, awarding authorities will not achieve the goal of the new competitive bidding statute which is to prevent unqualified contractors from receiving public construction contracts. Moreover, the right to reject unqualified bidders will assuage the difficulties awarding authorities will experience in attempting to carry out the prescriptions of the prequalification evaluation.²⁶⁴ If in the rush to prequalify bidders, one should slip through, the awarding authority would have another opportunity to reject.

By examining debarment at the federal level, it was suggested that Massachusetts debarment will not be invoked frequently because of the rigid procedural rights that attach to the decision to debar. If debarment is, in fact, infrequently invoked, then the ability of highly undesirable contractors to escape debarment may present special problems for awarding authorities at the prequalification stage of scrutiny.

Commentators have suggested that instead of imposing debarment, federal officials have sought less procedurally cumbersome means of prevent-

²⁶⁰ See 8 FINAL REPORT, *supra* note 10, at 346.

²⁶¹ *Id.* See, e.g., *Haughton Elevator Division v. State Division of Administration*, 367 So. 2d 1161, 1164 (La. 1979).

²⁶² MASS. GEN. LAWS ANN. ch. 149, §44D(3) (West Supp. 1980).

²⁶³ 8 FINAL REPORT, *supra* note 10, at 351.

²⁶⁴ See *supra* notes 224-228 and accompanying text.

ing undesirable contractors from obtaining contracts.²⁶⁵ A less procedurally cumbersome means might be possible at the federal level, as federal responsibility determinations demand far less, if any, procedural requirements before rejecting undesirable contractors.²⁶⁶ Under federal regulations, there are no specific procedures for responsibility determinations.²⁶⁷ In addition, one federal court has held that the requirements of due process are inapplicable to responsibility determinations.²⁶⁸ Similarly, federal courts have recently held that judicial relief is available for the resolution of bid protests, only in extreme cases where the procurement determination was without rational basis.²⁶⁹ Where adverse responsibility determinations take the place of debarment, however, certain procedural rights may arise. Federal courts have tolerated a number of consecutive adverse responsibility determinations regarding the same contractor, on apparently similar grounds, and have not required these determinations to meet the rigorous procedural standards of debarment.²⁷⁰ In the opinion of the comptroller general, however, debarment procedures must be invoked when successive nonresponsibility determinations take place.²⁷¹ Otherwise, a contracting agency may continuously disqualify bidders without affording them an opportunity to be heard.²⁷² At least one federal court has reasoned that an awarding authority may not bypass important procedural safeguards merely by omitting a formal label to the sanction applied.²⁷³ The court found that the fact that an awarding authority did not label its action a "debarment" was inconsequential to the nature of the procedures which should accompany that action.²⁷⁴ The same procedural considerations should apply to such "de facto" debarments accomplished through the prequalification system in Massachusetts.

Conducting the prequalification evaluation, Massachusetts awarding authorities are under no statutory obligation to conduct any hearing prior to disqualifying a prospective bidder.²⁷⁵ Any contractor disqualified by the prequalification evaluation may appeal the awarding authority's determination.²⁷⁶ The appeal, however, is very limited. Within two days after a contractor receives notice of his disqualification, he may appeal in writing to the Commis-

²⁶⁵ See *supra* note 208.

²⁶⁶ See 41 C.F.R. §1-1.1205 (1981).

²⁶⁷ See *id.*

²⁶⁸ Lapham, *supra* note 242, citing *Commerical Envelope Mfg. Co., Inc. v. John Dunlop*, No. 1573, (S.D.N.Y. 1975).

²⁶⁹ *M. Steinthal & Co. v. Seamans*, 455 F.2d 1289, 1301 (D.C. Cir. 1971); see *Wheelabrator Corp. v. Chafee*, 455 F.2d 1306 (D.C. Cir. 1971).

²⁷⁰ Lapham, *supra* note 242, citing *Commercial Envelope Mfg. Co., Inc. v. John Dunlop*, No. 1573, (S.D.N.Y. 1975).

²⁷¹ 43 COMP. GEN. 140 (1963).

²⁷² *Id.* at 141.

²⁷³ *Myers & Myers, Inc. v. U.S. Postal Service*, 527 F.2d 1252, 1259 (2d Cir. 1975).

²⁷⁴ *Id.*

²⁷⁵ See MASS. GEN. LAWS ANN. ch. 149, §44D(3), (6), (7) (West Supp. 1980).

²⁷⁶ *Id.* at §44D(7).

sioner of Labor and Industries.²⁷⁷ The commissioner reviews the decision and issues a written opinion.²⁷⁸ In the commissioner's discretion a hearing may be held, but a hearing by no means is guaranteed.²⁷⁹ A contractor who is repeatedly disqualified is not guaranteed a hearing on the validity of those decisions, unless he can persuade the Massachusetts courts to adopt the reasoning of the federal courts and comptroller general that "de facto" debarment entitles a contractor to the debarment procedures. Massachusetts courts may easily be persuaded that the procedural considerations given to de facto debarment at the federal level are equally applicable in Massachusetts. Where awarding authorities reject the lowest bidder on the grounds that he is unqualified, courts may be especially receptive to due process concerns. On the one hand, in cases where a low bidder is rejected, the rejection is the bidder's only obstacle to receipt of the contract.²⁸⁰ On the other hand, where an awarding authority disqualifies a prospective bidder, the prospective bidder has merely been denied a right to bid on a contract.²⁸¹ At that point, there is no means of determining whether the prospective bidder would have ever received the contract. Thus, awarding authorities may encounter challenges to their disqualification of a prospective bidder if that bidder has been repeatedly disqualified in the past and never been given an opportunity to be heard. As a result, awarding authorities may hesitate to disqualify prospective bidders, fearing a lawsuit charging denial of due process.

2. Subcontractors

Any potential for improving the quality of public construction brought by Massachusetts' new competitive bidding statute is seriously undermined by the statute's treatment of subbidders.²⁸² The filed subbid system of the old law is retained in the new competitive bidding statute.²⁸³ By retaining the filed subbid system of the old law, the new statute inherits some of its predecessor's problems.²⁸⁴ Under the new statute, just as before, it is likely that the quality of a subbidder's previous work will not be taken into account in determining whether that subbidder works on a public construction project.²⁸⁵ Further, where an unqualified or irresponsible subcontractor fails to perform properly, just as before, the general contractor will not likely be held accountable in the

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *See id.* at §44A(2).

²⁸¹ *See id.* at §44D(3).

²⁸² *See supra* notes 162-173 and accompanying text.

²⁸³ *See supra* notes 18-39 and accompanying text for a description of the filed subbid system.

²⁸⁴ *See supra* notes 59-68 and accompanying text for the Special Commission's assessment of the filed subbid system.

²⁸⁵ *See supra* notes 60-63 and accompanying text.

future for that poor performance.²⁸⁶ This section of the note first will describe why these familiar problems are likely to persist. Then, whether the new statute's addition of debarment or the prequalification system for general contractors will increase the attention subbidder qualifications receive over what attention they received in the past will be considered. Finally, this section will recommend alternative evaluation procedures by which subcontractors' qualifications will receive appropriate consideration prior to the award of a contract.

The new competitive bidding statute has kept the filed subbid system of the former statute. The filed subbid system allows the awarding authority to examine the competency of subbidders before they are placed on a list of eligible subbidders, but does not require such an appraisal.²⁸⁷ The history of discretionary authority to examine the qualifications of contractors in Massachusetts, studied by the Special Commission, indicates that most awarding authorities have neither the staffing nor the expertise to design or carry out such an evaluation.²⁸⁸ This history is particularly significant in connection with the discretionary authority to examine subbidder qualifications.²⁸⁹ The period within which the awarding authority may evaluate subbidders was, and still is, only two days.²⁹⁰ Because the new statute has retained the filed subbid system of the old statute regardless of its failures, it is probable that awarding authorities will still fail to review the qualifications of subbidders.

Although awarding authorities may not review the qualifications of subbidders, the new competitive statute authorizes the Deputy Commissioner of Capital Planning and Operations to debar subcontractors for a variety of misconducts, including a record of poor performance.²⁹¹ As noted above, however, it is unlikely that debarment frequently will be invoked because of the rigid procedural standards it requires.²⁹² Thus, debarment may not prevent adequately even the least desirable subcontractors from obtaining a contract. Yet, because of the new statute's prequalification requirements general contractors may show a new interest in the competency of their subcontractors, despite the indifference of public authorities.

Under the former statute, general contractors, just as awarding authorities, were unlikely to evaluate the qualifications of subbidders.²⁹³ General contractors were forced by the filed subbid system either to select subbidders exclusively on the basis of price, regardless of competence, or face a serious risk of losing the contract to a more price-conscious general bidder.²⁹⁴ The general bidder was aware that among all his competitors, at least one would choose the

²⁸⁶ See *supra* notes 64-68 and accompanying text.

²⁸⁷ MASS. GEN. LAWS ANN. ch. 149, §44E(1) (West Supp. 1980).

²⁸⁸ 8 FINAL REPORT, *supra* note 10, at 344.

²⁸⁹ 1 FINAL REPORT, *supra* note 10, at 5-3.

²⁹⁰ MASS. GEN. LAWS ANN. ch. 149, §44F(3) (West Supp. 1980).

²⁹¹ *Id.* at §44C(3)(b).

²⁹² See *supra* notes 183-210 and accompanying text.

²⁹³ See *supra* notes 64-68 and accompanying text.

²⁹⁴ See *supra* notes 65-66 and accompanying text.

lowest subbidders on the list.²⁹⁵ Further, because general contractors were not held accountable for their subcontractors through any sort of prequalification process, there was no incentive for them to review the past performance of subbidders.²⁹⁶ The new competitive bidding statute's prequalification system creates an incentive for general contractors to study the competency of listed subbidders before selecting a subbidder to include in the general bid.

The new prequalification system, to a certain degree, forces the general contractor to consider the qualifications of his subcontractors. Under the former statute, general contractors rarely underwent any formal or informal evaluation of their past performance before receiving a contract.²⁹⁷ Therefore, a general contractor could maximize his opportunity for obtaining a contract by selecting the lowest subbidders, regardless of their abilities.²⁹⁸ Now, general contractors are subject to a rigorous prequalification evaluation.²⁹⁹ Significantly, such prequalification evaluations take place *before* a general bid is submitted and thus in no way affect which subbidders a general bidder selects for the particular bid. The general contractor's concern, then, is limited to his ability to prequalify in the future if he chooses incompetent subcontractors for the present contract. This concern is real because the prequalification evaluation focuses, in small part, on the general contractor's history of dealings with subcontractors.³⁰⁰ Presently, the evaluation devotes very little attention to such past dealings with subcontractors. In the evaluation there are four categories rated. Subcontractors are considered as one of eight factors within the "Performance and Accountability" category.³⁰¹ This attention, although slight, creates a greater incentive, now, for a general contractor to consider the competency of subbidders before making his selection, than existed previously. It is uncertain whether this small component in the prequalification evaluation will provide so significant an impetus that a general contractor would forego a low subbidder with questionable qualifications in favor of a higher subbidder with ample qualifications and run the risk of losing the contract based on price. Thus, there is a possibility that general contractors, just as awarding authorities, will not consider the qualifications of subbidders even under the new competitive bidding statute.

Absent any modification, the new competitive bidding statute may continue to permit unqualified subcontractors to obtain work in the public construction industry and thus, undermine the quality of public buildings. The subcontractor who continually submits the low bid will only have to avoid debarment in order to continually obtain public contracts. As noted above, it

²⁹⁵ See *supra* note 67 and accompanying text.

²⁹⁶ See *supra* note 68 and accompanying text.

²⁹⁷ See *supra* notes 52-58 and accompanying text.

²⁹⁸ *Id.*

²⁹⁹ See *supra* notes 102-150 and accompanying text.

³⁰⁰ See *supra* notes 171-173 and accompanying text.

³⁰¹ See, NEW GUIDELINES, *supra* note 110, at 5-6.

appears that debarment will seldom be invoked.³⁰² The general contractor, unless held accountable for the work of his subcontractors, has no incentive to select especially competent subcontractors, but instead is inclined to choose subcontractors exclusively on the basis of price. As a result, the quality of public construction probably will suffer as long as the filed subbid system continues in operation without modification.

To evaluate the validity of any modification of the filed subbid system, it is necessary first to acknowledge that the entrenched policy preferences of preventing bid shopping and bid peddling are necessary elements of any statutory scheme.³⁰³ There are a number of modifications which could alleviate the problems the new competitive bidding statute will have in ensuring the selection of competent subcontractors, while continuing to discourage bid shopping and bid peddling.

A simple legislative amendment to the competitive bidding statute would provide a partial solution to the problem of selecting competent subcontractors. The amendment would require that awarding authorities evaluate the qualifications of prospective bidders on subcontracts estimated to cost above a certain dollar amount. The amount could be left to the discretion of the awarding authority, but in no event could it exceed a certain statutorily determined amount. The procedures and criteria for such an evaluation could be prescribed by the Deputy Commissioner of Capital Planning and Operations and be less rigorous than those in place for the evaluation of general contractors.³⁰⁴ A flexible dollar amount accompanied by procedures for evaluations by the Deputy Commissioner would encourage awarding authorities to undertake such evaluations by reducing the administrative burdens that presently exist if an awarding authority elects to evaluate subbidders.³⁰⁵ Not all subbidders would have their qualifications evaluated, only those for which bids were anticipated to exceed a certain dollar amount. Instead of receiving no guidance for evaluating subcontractors,³⁰⁶ certain subbidders' qualifications would be reviewed by an evaluation formulated by the Deputy Commissioner. This amendment, while not a complete solution to the problem of selecting subcontractors, at least ensures that major subcontracts would be awarded to responsible and qualified subcontractors.

A more comprehensive reform would be to repeal filed subbidding. The Special Commission originally recommended that a bid listing system,

³⁰² See *supra* notes 184-210 and accompanying text.

³⁰³ See *supra* notes 34-37 and accompanying text.

³⁰⁴ See *supra* notes 102-150 and accompanying text for a description of the evaluation procedures and criteria used for general contractors.

³⁰⁵ See *supra* notes 222-228 and accompanying text.

³⁰⁶ See MASS. GEN. LAWS ANN. ch. 149, §§44E, 44F (West Supp. 1980). See *supra* notes 163-164 and accompanying text for a discussion of an awarding authority's ability to review the qualifications of subbidders.

modeled on federal procurement law,³⁰⁷ replace filed subbidding.³⁰⁸ The Massachusetts legislature rejected this option.³⁰⁹ A bid listing system would have required general contractors to list in their bids the subcontractors who would work on the project and would have required performance by the listed subcontractors as a condition to the general contract.³¹⁰ The awarding authority would not, then, solicit subbids. Under federal regulations, the General Services Administration requires such listing of subcontractors in general bids.³¹¹ Several states also require bid listing.³¹² Bid listing allows a general contractor to have more authority over its subcontractors than filed subbidding, by removing the awarding authority, to a large extent, from the subcontractor selection process. With the greater authority, a general contractor would likewise face greater accountability for the work of its subcontractors. Thus, the general contractor would select subcontractors with satisfactory records of performance. Bid listing is also designed to combat the practice of bid shopping and peddling by requiring that general contractors use the subcontractors listed in the general bid as a condition of the contract.³¹³ Bid listing, in itself, however, will not control bid shopping that takes place before the award of a contract.

While a bid listing system alone does not address the problem of bid shopping and bid peddling that occurs before the general contract is awarded, bid listing under the Massachusetts statute could prevent such practices. The statute's debarment mechanism and evaluation pose obstacles to bid shopping and bid peddling by the general contractor prior to the contract award. To begin, the general contractor is no longer chosen without regard to his qualifications.³¹⁴ Accordingly, a general contractor risks future debarment, or, at least, disqualification from one contract award, by soliciting cut rate subbids that lead to unsatisfactory performance. Because of the reforms of the new statute, then, abandonment of the filed subbid system is not likely to promote bid shopping or bid peddling. Therefore, the Massachusetts legislature has less reason to cling to the filed subbid system. Achieving legislative change in this direction may still be difficult, however, given the likely opposition of the sub-

³⁰⁷ 41 C.F.R. §5B-2.202-70 (1981). 8 FINAL REPORT, *supra* note 9, at 339.

³⁰⁸ 8 FINAL REPORT, *supra* note 9, at 339.

³⁰⁹ See MASS. GEN. LAWS ANN. ch. 149, §44F (West Supp. 1980).

³¹⁰ See *e.g.*, CAL. GOV'T CODE §§4101, 4107 (West 1980).

³¹¹ 41 C.F.R. §5b-2.202-70 (1981). See FINAL REPORT at 335-39.

³¹² States that required bid listing include California (CAL. GOV'T CODE §4104 (West 1980)), New Jersey (N.J. STAT. ANN. §52:32-2 (West Supp. 1982)), New York (N.Y. STATE FIN. LAW §138 (McKinney 1940)), North Carolina (N.C. GEN. STAT. (1958 repl.) §143-128), Ohio (OHIO REV. CODE (Page 1953) tit. 1§153.50), Pennsylvania (PA. STAT. ANN. (Purdon 1957) tit. 53 §100.3).

³¹³ 8 FINAL REPORT, *supra* note 9, at 335. See Comment, "Construction Bidding Problem: Is There a Solution Fair to Both the General Contractor and Subcontractor?" 19 ST. L. J. 552, 573 (1975).

³¹⁴ See *supra* notes 109-150 and accompanying text.

contracting trades.³¹⁵ Still, other more politically feasible reforms may ensure the selection of competent subcontractors.

Rather than establishing a bid listing system, there are less drastic administrative modifications of the filed subbid system which would focus more attention on the competence of subbidders during the bidding process than is the case under the current filed subbid system. The Deputy Commissioner of Capital Planning and Operations has general authority under the statute to promulgate non-binding guidelines for evaluating subbidders.³¹⁶ The statute also grants the Deputy Commissioner broad discretion to formulate relevant factors for use in evaluating prospective general bidders.³¹⁷ Under these powers, the Deputy Commissioner could introduce a separate category to evaluate general contractors based upon a contractor's past relationships with subcontractors. The evaluation could be made by awarding authorities or by both awarding authorities and general contractors.

The promulgation of guidelines for the evaluation of subbidder qualifications will encourage awarding authorities to undertake such evaluations although they will be under no obligation to do so. Under the statute, an awarding authority may require a subbidder to supply any information relevant to making a determination of that subcontractor's competence.³¹⁸ Just what that information should be and what form the evaluation should take is left for the expert consideration of the Deputy Commissioner. In the past, awarding authorities were reluctant to review the qualifications of general bidders and subbidders when such review was optional.³¹⁹ This reluctance was generated by a lack of staffing to conduct the investigations and a fear of lawsuits arising out of adverse determinations resulting in disqualification.³²⁰ Non-binding guidelines will offer awarding authorities the opportunity to administer a standard evaluation. But because awarding authorities still may have inadequate staffing to conduct a comprehensive evaluation of subbidders, the guidelines should allow such an evaluation to be capable of quick completion and accuracy. The structured suggestions of the Deputy Commissioner may bolster an awarding authority's willingness to undertake an evaluation and serve as a vehicle for the awarding authority to provide ample support for its conclusions.

The statute also grants the Deputy Commissioner broad discretion in structuring the procedures and criteria for evaluation of a general contractor's qualifications for a particular contract.³²¹ While the statute supplies certain criteria for evaluation, the Deputy Commissioner may, at his option, elect to include other relevant criteria. Such an additional criterion for evaluation

³¹⁵ 8 FINAL REPORT, *supra* note 9, at 339-40.

³¹⁶ MASS. GEN. LAWS ANN. ch. 149, §44E (West Supp. 1980).

³¹⁷ *Id.* at §44D.

³¹⁸ *Id.* at §44F.

³¹⁹ 8 FINAL REPORT, *supra* note 9, at 293, 344-46.

³²⁰ *Id.* at 346.

³²¹ MASS. GEN. LAWS ANN. ch. 149, §44D (West Supp. 1980).

might be the record of the general contractor in dealings with subcontractors. This criterion would involve inquiry into whether the general contractor has selected reliable subcontractors in the past and whether the general contractor selected subcontractors who habitually caused performance delays, disputes or other problems. This factor could be included in the "finished product quality" category of the evaluation.³²² With the added criterion, a general contractor, though choosing from among listed subcontractors, would have a strong motivation to select a qualified, as well as low-priced, subcontractor. The desire of the general contractor to use a particular subcontractor by pursuing solely low-priced subbids would be moderated by his concomitant desire to remain eligible to bid on future contracts. These administrative proposals for modification of the present filed subbid system would increase the tension between qualifications and prices of subbidders.

While the proposed legislative amendments would have a much more direct effect, the suggested administrative modifications may significantly improve the quality of workmanship in the subtrades on public construction projects. Absent revision, administrative or legislative, the promise for quality public construction commenced by the new competitive bidding statute probably will be defeated by the work of incompetent subcontractors.

CONCLUSION

Massachusetts' new competitive bidding statute includes two procedures by which general contractors likely to perform poorly may be prevented from obtaining public construction contracts, by debarment and by an adverse outcome on a prequalification evaluation. Subcontractors, though subject to debarment, escape any formal prequalification evaluation. While these procedures may improve the quality of work performed under Massachusetts' public construction contracts, there are three weaknesses in the new competitive bidding statute which may prevent it from achieving its goal of improving the quality of public buildings.

First, debarment may not be used frequently because of the procedural requirements now associated with debarment and which later may attach to adverse qualification evaluations. The federal experience indicates an administrative reluctance to impose debarment because of the stiff procedural guarantees associated with it. If debarment is not used, then the burden of screening out unqualified and irresponsible contractors will fall to the prequalification process.

Second, the prequalification system for general contractors required by statute and prescribed by guidelines is very complex. Although the disclosure required will supply awarding authorities with adequate information, the procedures for synthesizing and evaluating that information do not account for the lack of adequate staffing of awarding authorities. As a result, awarding

³²² See NEW GUIDELINES, *supra* note 110, at 4-5.

authorities may have a very difficult time adhering to the rigorous prequalification evaluation procedures. Thus, knowing that they have not followed the prescribed evaluation procedures, awarding authorities may be reluctant to disqualify an unqualified prospective bidder.

Third, subcontractors' qualifications were not exposed to scrutiny in the past and it is dubious whether the new competitive bidding statute will alter this lack of scrutiny in the future. The new statute requires formal review by neither the awarding authority nor the general contractor. A general contractor may have an incentive to choose only responsible subcontractors because of the potential impact poor performance on the part of a subcontractor may have on the general's ability to obtain public construction contracts in the future. There is no reason to believe, however, that awarding authorities will undertake such an evaluation. Without modification, the statute leaves great potential for unqualified subcontractors to undermine the quality of public construction.

These weaknesses will not necessarily be fatal to the well-intentioned system. At the foundation of the new preventive remedies lies debarment. While not frequently imposed at the federal level, it is essential that state administrators make prudent use of debarment to prevent the chronic malperformers in the construction industry from obtaining public contracts. Prequalification, then, can be used to ensure that contractors, who are generally competent, are specifically competent for each contract. The prequalification evaluation, however, is far more rigorous than it need be. As presently designed, it imposes an unduly heavy administrative burden on awarding authorities in complete disregard of the Special Commission's recognition that under the old system most awarding authorities lacked sufficient staffing to undertake general contractor evaluations. Several recommendations were set forth which are aimed at reducing this administrative burden. At least until certain adjustments are made in the prequalification evaluation, it is essential that courts recognize an awarding authority's right to reject a general bidder, as opposed to a prospective general bidder, for a limited number of reasons under the present statute. Finally, in order to protect the integrity of public buildings, the qualifications of subcontractors must be subjected to review, either by placing the direct responsibility for performance by subcontractors squarely on general contractors or by requiring awarding authorities to undertake evaluation of subcontractor qualifications under certain circumstances. With these adjustments, the competitive bidding statute will achieve its goal of constructing quality public buildings at the lowest possible price.

MARK VINCENT NUCCIO